the FIJActivist

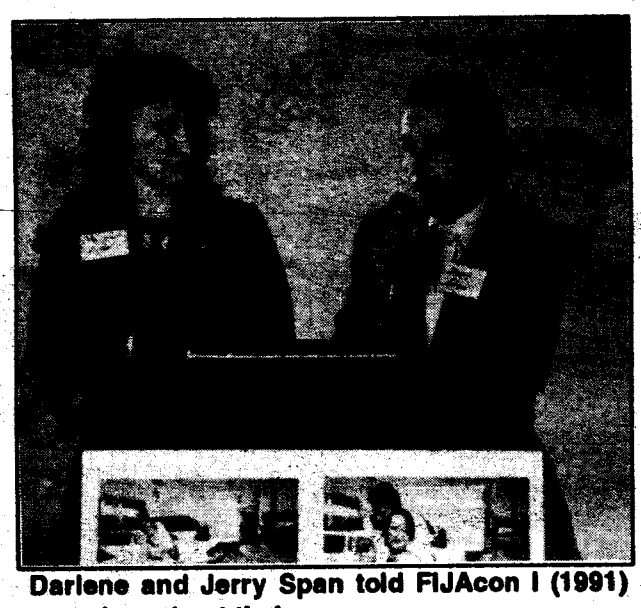
Newsletter of the Fully Informed Jury Association

Volume 3, No. 2 Summer, 1996

Darlene & Jerry Span Win on Appeal!

By DON DOIG

The case of Darlene and Jerry Span, which we have followed since 1990, has finally turned out well. The Ninth Circuit Court of Appeals has overturned their convictions on federal charges of "assaulting" federal officers. The Spans were, according to eyewitnesses, attacked by two federal marshals who without provocation, roughed them up. Darlene struggled with the Marshal who had grabbed her hair and thrown her against a fence.



Darlene and Jerry Span told FIJAcon I (1991) attenders about their case.

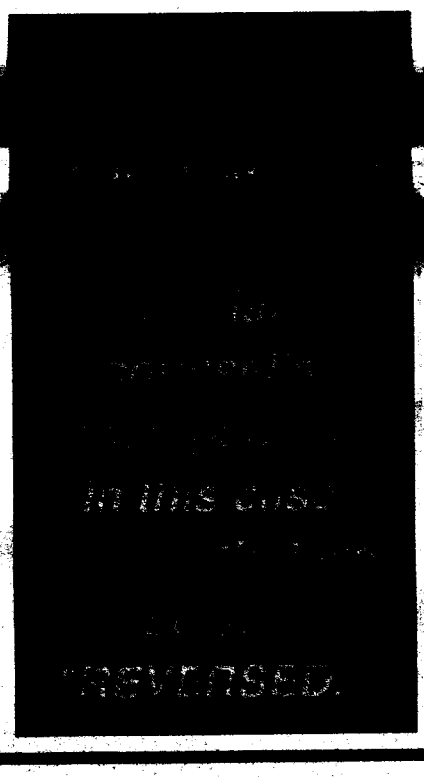
Darlene Span, photographed here by her mother, tries to fend off an assault by a U.S. Marshal. At the time of the assault, Darlene had no idea who the man was.

Jerry Span, like his sister Darlene, was attacked by an unknown assailant, who later turned out to be a U.S. Marshal.

The marshals had arrived at their place of business in Phoenix, Arizona with a wanted poster for a 63 year old fugitive who they thought might in fact be a Span [illegible] and received brief attention from the Spans who said, "No, that's not our [illegible] tormers, the marshals [illegible]

The Spans were arrested on charges of assaulting the marshals because they had dared to struggle against unreasonable and excessive force. In the trial, the judge told the jury that the law required that they lie there and take the beating. The jury believed that the judge had given them no choice but to convict, even though they thought the law was wrong and the system had abused the Spans. They wrote letters and talked to the press. FIJA highlighted the case as illustrative of what happens when jurors are not told the truth about their powers as jurors.

Two prominent attorneys had handled the Span's case, one for the trial (Oscar Goodman of Las Vegas) and one for the appeal (Alan [illegible] argued that the judge had not given the instruction would have pointed out that citizens under U.S. law have the right to resist the excessive use of force by law enforcement officers. Excessive use of force by officers is not considered to be a good faith performance of duty. The Ninth Circuit Court of Appeals agreed, but said that since the defense council had not formally [illegible] tion, they let the conviction stand.



se this time, after consulting with paralegals, retired lawyers and an attorney just out of law school, to reverse the conviction. She argued that Goodman was incompetent, and her 6th Amendment right to effective assistance of counsel was thereby denied. (Attorney Dershowitz had not raised the issue of incompetence of counsel.) [illegible] ognize that not every instance of counsel's ineffective handling of the [illegible] tude of trial counsel's incompetence in this case require that we do so.

REVERSED."

Darlene and Jerry are still in need of legal assistance, and funds to continue the fight—a lawsuit filed by the marshals is still pending. They lost their suit against the marshals; the judge told the jury that they had, after all, been convicted of assault. Someone is also needed to help with writing. Contact them at: 110 N. 24th St., Phoenix, AZ 85034. 1-602-273-1903.

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Jury Rights Day

Thursday, September 5, 1996

FIJA's national Jury Rights Day, in commemoration of the acquittal of William Penn and William Mead in London, September 5, 1670, by a fully informed jury, is an annual celebration involving distribution of FIJA literature at courthouses around the country.

You are invited to join with others in celebrating and reaffirming the importance of trial by an independent jury. We urge all local FIJA activists to join—or organize— an event at their local courthouses.

If possible, show up early, between 7:30 and 8:00 AM. Stay on the sidewalk

(Continued on page 3)

the FIJActivist

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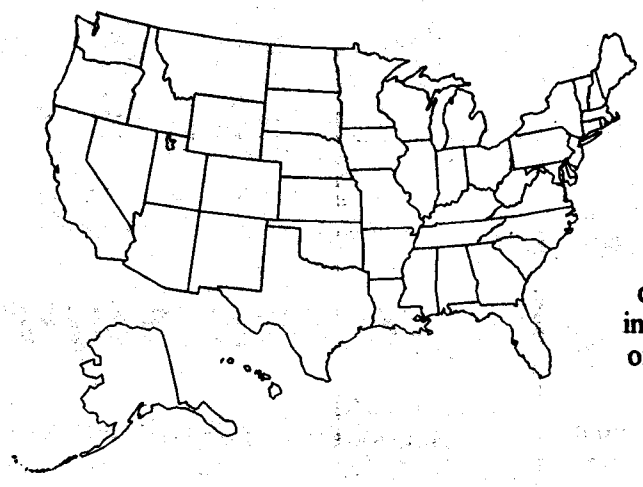
State News



News and Commentary from the Frontlines of the FIJA Movement

By DON DOIG

ALABAMA

Harvey Wysong reported that someone placed FIJA brochures throughout a courthouse in Huntsville, in bathrooms, inside magazines in the juror's waiting room, and so on. In one case, the prosecutor got up and ranted about the brochures and tore one up in front of the jury. In a case scheduled to be heard that day, the defendant had refused to get a driver's licence, for which he had been fined six times, but in order to ensure jail time the state had to convict him of driving with a suspended license— so the state gave him one against his will, then immediately suspended it and arrested him for driving with a suspended license... After the brochures were discovered, the trial was postponed. The outcome is unknown—assuming they ever bring it to trial. In another case heard that day, a drug defendant was found not guilty by a (fully informed?) jury.

Harvey Wysong Georgia FIJA Coordinator

ALASKA

Attorneys for **Frank Turney** gave oral arguments to the Alaska Supreme Court on February 2. He is awaiting a decision. Turney appealed his prosecution for jury tampering on First Amendment grounds.

Professor and Borough Assemblyman Bob Logan introduced a FIJA resolution to the Northstar Borough in Fairbanks again this year. Alas, it again failed to pass, on a vote of 6 to 4. The City Council passed the resolution last year, but the Borough did not. *KFAR Radio* in Fairbanks continues to play FIJA PSAs.

CALIFORNIA

Assemblyman Steve Baldwin's AB 3079 has died in committee. **Senator Don Rogers** has indicated he may introduce it in the Senate now. Letters of support to committee members from Californian FIJA supporters will be essential!

Godfrey Lehman appeared on KSFO radio in San Francisco, with an enthusiastic host, and got in a good plug for FIJA. He also appeared again on KQED public radio. Some good news! Lehman reported that a California Assembly Committee killed a referendum eliminating the unanimity requirement for California juries (6 to 4 against), and the ballot initiative to the same effect also died on the vine. Lehman also testified before the Judicial Counsel of California (a "Blue Ribbon" commission) on the subject of "improving" the jury system.

Godfrey Lehman California FIJA Contact

Red Beckman Montana FIJA Contact

Peyman Mottahedeh continues to distribute literature in the Long Beach area, and to speak on the subject of FIJA at meetings. In early July, Peyman, Godfrey Lehman, and **Red Beckman** addressed a Freedom Rally on the subject of FIJA. The rally, in Sunnyvale, was attended by 400 people, and hundreds of pieces of FIJA literature were distributed. Peyman's *Freedom Law School*, now with 100 graduates, uses FIJA literature among its materials.

Peyman Mottahedeh California FIJA Contact

FLORIDA

In the case of a man who is accused of burning an abandoned "crack house" in his neighborhood, **Bill Pinkus**, attorney for the *Palm Beach Post*, has prevailed in a hearing to unseal the names and addresses of prospective jurors. The trial judge had sealed the names in order to prevent FIJA literature from reaching the jury. In overturning the order, the hearings judge said nothing in this literature was intimidating or threatening to the jury, the only grounds for such an order. Thanks to **Nancy Lord** for her assistance..

KENTUCKY

FIJA Coordinator **David Fletcher** of Mayfield has introduced FIJA information at *John Birch Society* and *United We Stand America* meetings, and had a FIJA video running on local cable access television. He has also opened a dialogue with area district attorneys.

MAINE

Don Christen of *Maine Vocals* and his associates continue to be active on behalf of FIJA, as he fights to legalize marijuana and stay out of jail.

MASSACHUSETTS

Dan Edmonds recently distributed FIJA brochures at the District Court in Quincy, Mass., and local attorneys reported that no convictions were gained that day. The judges and prosecutors were not happy campers. Dan is also scheduled to speak to a father's rights group soon.

MICHIGAN

Mark Hiselman has placed a newspaper box at a bus depot in Ann Arbor, Michigan, containing *FIJActivist* newsletters. Others are planned.

MISSOURI

Representative Bill Alter's FIJA bill failed in a contentious legislative hearing.

NEVADA

Keith Kindred has been arrested in Las Vegas on charges of influencing a juror, for distributing FIJA brochures in front of the Clark County Courthouse, which he has done for two years. Prosecutors claim he was trying to influence jurors in his upcoming June 24 trial on charges of lewdness with a minor.

On June 10, fifteen protesters turned out at the courthouse to distribute FIJA literature. None were arrested. The demonstration was organized by **Doug Millar**. Attorney **Lamond R. Mills** has agreed to take the case, but money must be raised. Thanks to **Juanita Clark, Mike Iamaio** and all the others who helped.

To contribute, send donations to: Kindred Defense Fund, c/o Ace Welding Services, 235A Elliott Rd., Henderson, NV 89105. The person in charge of the fund is **Evan Coker**, phone 702-566-3288.

NEW HAMPSHIRE

In Concord, New Hampshire, **Dick Marple** appeared on the "Right for New Hampshire" TV show, produced by the *John Stark Foundation.*

NEW JERSEY

Emerson Ellett has reported that the Monmouth County FIJA group continues to leaflet at local courthouses on a regular basis, and that the Somerset County group is also intermittently active.

Emmerson Ellett New Jersey FIJA Coordinator

NEW MEXICO

Cisco Mandeville came in third in a five-way race for municipal judge in Socorro, New Mexico, with 11% of the vote. He emphasized jury rights and issues related to victimless crimes. On June 10, he will be featured on an Albuquerque cable access program, where he will discuss FIJA.

(Continued on next page)

FIJA's venerable "TRUE OR FALSE?" brochure has seen a lot of action. Edited for improvements on a regular basis, it remains effective and inexpensive. Display stands are available at $4.00 (1 free upon request with orders of 1000 or more brochures. See page 17).

the FIJActivist

Newsletter of the Fully Informed Jury Association

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NEW YORK

FIJA activist **Anthony Russo** of Orange County, New York, has organized a literature distribution team which regularly leaflets local courthouse parking lots. Anthony is not the film producer of the same name (who is also a FIJA supporter).

OHIO

Activists have been distributing FIJA literature in the Cincinnati area, where the director of the *Greater Cincinnati Cannabis Buyer's Club*, **Richard Evans**, has been arraigned, and his home raided. CBC chapters around the country distribute low cost marijuana to people who have serious illnesses such as cancer, glaucoma, AIDS, and multiple sclerosis, and who have a physician's recommendation. A FIJA educational campaign is planned. **Kay Lee** has been distributing FIJA fliers.

Lewis Wolk has been calling numerous talk radio shows to discuss FIJA in Cleveland and Pittsburgh, Pennsylvania.

TEXAS

Texas GOP Endorses FIJA Legislation in 1996 Platform!

The *Republican Party*, at its state convention in San Antonio the weekend of June 23, 1996, added a plank to its platform endorsing legislation that will fully inform jurors. The platform plank language is:

Jury Reform - *We urge the Texas Legislature to pass legislation protecting the right to privacy and security of prospective jurors during the jury selection process. The courts must show the relevance of questions asked of jurors and peremptory challenges to the relevance of the lawyer's need to know. The Party urges the Texas Legislature to [illegible] party in a criminal trial to inform jurors of their rights to determine both the law and the facts and to render a verdict according to conscience. We urge the Texas Legislature to reform the jury selection process to ensure that educated and morally responsible people are not excluded as jurors.*

The Texas Republican party thus joins the Republican parties of Nevada, Iowa and Montana in adopting a plank calling for FIJA legislation.

Many folks worked for this victory. Special credit goes to **Sonya Bernhardt** of Montgomery County, and **Phil Koehne** and **Ron Avery** of Guadalupe County, who successfully guided the call for the addition to the platform through their respective Senate District conventions. Many more folks attempted valiantly to gain passage at the precinct and senate or county levels, educating Republican activists along the way.

Thanks also go to **Billie Zimmerman** of San Antonio, **David Plummer** of Dallas, and **Liz Koepp** of Adkins, GOP platform committee members who voted for the plank and are on the Lone Star FIJA mailing list. **Ken Clark** of League City, another LS-FIJA activist, who was initially appointed as a platform member made sure his replacement, **David Wright**, was educated on the issue. David went on to head the Criminal Justice subcommittee that wrote the plank, and was a vocal defender of the debate on the plank in the full committee.

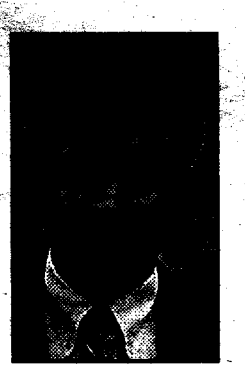
Only one platform committee member (out of 31) spoke and voted against the plank, **Judge Danny Edwards**, of Hunt. He presented a spirited attack on the FIJA idea, claiming that militia members, the Freeman, and terrorists adhered to it, asking the committee if they wanted to be associated with them that way.

The rest of the committee offered equally intense responses. One said the Founding Fathers believed in these ideas, too. **David Wright** said that the Freemen believe in God, but that won't stop him from believing in God either. Another committee member pointed out that **Edward's** arguments were simply demonization, and invalid.

During the debate, the committee asked **Tom Glass**, Lone Star FIJA President, to present testimony

Lone Star FIJA also ran a well received booth at the Republican State

(Continued on page 4)



Tom Glass
Texas FIJA Coordinator

FIJA National News...

FIJA case being appealed to the Supreme Court

By DON DOIG

Thanks to support from the Washington-D.C. based *Foundation to Defend the First Amendment*, headed by **Jim Tucker**, attorney **Peter Lepiscopo** of San Diego has filed a Petition for Writ of Certiorari with the Supreme Court in the case *Fully Informed Jury Association, et al. v. County of San Diego, et al.*. The case stems from the arrest of **Jim Harnsberger** on contempt of court charges for violating a "general order" issued by San Diego municipal and superior courts against distribution of FIJA literature outside San Diego courthouses. Also involved is a general order for the removal of newsracks from in front of the courthouses. The Ninth Circuit Court of Appeals had ruled against *FIJA et al.*.

The petition asks

"1. Whether the order prohibiting distribution of jury nullification materials in a traditional public forum is an unconstitutional [illegible] regulation of political speech.

"2. Whether the order removing newsracks from a traditional public forum is an unconstitutional content-based regulation of speech and the [illegible] lic forum is an unconstitutional time, [illegible]

write FDFA at 300 Independence Ave., S.E., Washington, D.C. 20003. A win here could stop the harassment of FIJA activists in front of courthouses around the country.

In other Supreme Court news, **John Wolfgram** reports that the Court has turned down his petition on behalf of **Dixianne Hinkle**, the first person ever arrested for distributing FIJA literature.

Media Coverage

News Talk Television, broadcast from New York City, aired a roundtable with host **Patrick Halpin** on the subject of jury nullification. New Jersey FIJA Coordinator **Emerson Ellett** appeared in person, and Don Doig was connected via long-distance telephone (with a still photo to accompany his comments). *News Talk Television* also asked for a FIJA file for their web site, and promised to link their web site with one of ours. *News Talk Television* also flew **Godfrey Lehman** to Los Angeles to film a segment on common law courts.

Emerson Ellett, along with Professor **Paul Butler** and others appeared on a *Phil Donahue Show* segment on jury nullification which ran on May 31.

Don **Doig** appeared on **James Kassouf**'s talk radio show on *WERE*, Cleveland at 7:15 PM, Thursday, April 4. He also appeared on the *Thommis Paine for Common Sense Show*, on the *Orbit 7 Radio Network*, Sat Com C-5. Doig appeared on the *Wes Minter Show* on KCMO, Kansas City, which reaches 9 states. He was also a guest on the *Talk Radio Network*, with host **Randy** [illegible] *Degrees of Freedom*" with **Don Ellis** on KVSF, Santa Fe New Mexico—the largest talk radio station in northern New Mexico. Doig also appeared on the *Kevin Jones Show* on WJR, Detroit, [illegible] vention of the *Libertarian Party of*

This is available on your local newsstands.

Harvey Wysong was a guest on the *Les Templeton Show* on the *Eagle Radio Network* on May 19. He was also a guest on **Larry Pratt**'s show on WWCR Shortwave 5.065 Hz on July 9.

Trial, May 1996, published by the *Association of Trial Lawyers of America*, featured a positive article on jury nullification and FIJA. In it, Associate Editor **Donald C. Dilworth**, after discussing the debate among legal professionals, says: "The debate over nullification and jury instructions, however, is no longer academic. The cat is out of the bag." Then goes on to discuss FIJA, and how lawyers can use nullification strategies to gain acquittals.

Clay Conrad has had an excellent 41 page article published in the *Texas Forum on Civil Liberties & Civil Rights*, Winter 1995, Vol.2, No. 1, entitled "Jury Nullification as a Defense Strategy".

Front page articles on FIJA have appeared in the *Kansas City Star* and the *Modesto Bee* in California. A good article also appeared in the *American Criminal Law Review*, published by the Georgetown University Law Center. It is "Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of its Nullification Right", by **David C. Brody**. (Vol. 33, No.1, Fall 1995) Attorney **Karen Selick** from Bloomfield, Ontario, had an excellent article on FIJA published in *Canadian Lawyer* magazine.

Aaron Zelman of *Jews for the Preservation of Firearms Ownership*, [illegible] in the [illegible] of pub- [illegible] stallment of the *Gran'pa Jack* comic booklet for children [illegible] S. Wentworth Ave, Milwaukee, WI

Jim Harnsberger has announced he is dropping plans to leaflet the trial of Oklahoma City bombing suspects McVeigh and Nichols. A consensus developed, particularly among FIJA supporters in Colorado (the site of the trial), that this would not be a good trial to leaflet. It was thought that the case would not showcase the proper use of jury nullification (it was hardly a victimless crime), and would bring bad public relations to the cause.

Russell Means has resigned from the Board of Directors. **David Delo**'s contract as Executive Director has expired, and he is no longer with FIJA. We thank him for his valuable assistance.

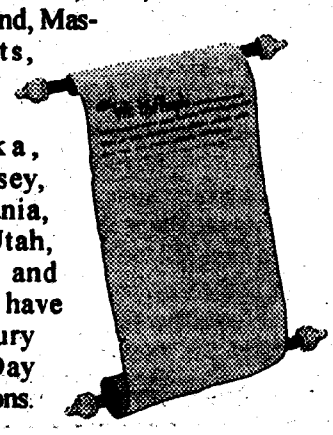
Jury Rights Day

Thursday, September 5, 1996

(Continued from page 1)

in front of the courthouse, and distribute only FIJA literature, to every one who passes. Be polite and dress well. Issue a press release to the local media, and get confirmation that they will show up. A video camera in the hands of one of our supporters would be a good idea. Well-made posters are also appropriate, as is one of FIJA's banners (see order form). Be sure to order materials well in advance, or have your own printed.

Governor John G. Rowland has already signed an official Jury Rights Day proclamation this year, and to date, governors of sixteen states (Connecticut, Delaware, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Montana, Nebraska, New Jersey, Pennsylvania, Texas, Utah, Vermont, and Wisconsin have signed Jury Rights Day proclamations.



State News

Continued from page 3

Convention. LS-FIJA gained 29 new members on the spot, handed out literature to 2500 people (including **Tom Phillips**, Chief Justice of the Texas Supreme Court and many other judges and legislators). We expect many more to mail in new memberships, after they get home.

Thanks to **Allen Bearden, Jim Hayman, Oliver Barton, Sonya Bernhardt, Sharon Montgomery, Mel Wheeler** and Tom Glass for staffing the booth. The posters of quotes and pictures of Jefferson, Adams, Jay, the Texas Constitution, and *Jacob's Law Dictionary* used as backdrops at the booth, which received rave reviews and requests on how to purchase, were the production of **Trey Summitt.**

The other big news is that **Representative Gary Elkins** (R- Houston) has told LS-FIJA that he plans to make passage of FIJA legislation in Texas his number one 1997 priority! Rep. Elkins has already sent the language from the FIJA bill introduced in 1995 by **Rep. John Longoria** (D-San Antonio) to the Texas Legislative Counsel for drafting in preparation for introduction in 1997.

Rep. John Longoria D-San Antonio, Texas

Greg Knapp, LS-FIJA contact, presented testimony to the *Texas Conservative Coalition*, an organization of conservative state legislators, in Dallas in April. **Dotti Squires**, who has retaken the job of El Paso contact, spoke to the same group when they held hearings in El Paso later in April. **Ann Utterback** has taken over as San Antonio contact.

Tom Glass visited with **Rep. Buddy West** (R-Odessa) in June, and received West's assurance that he would co-sponsor the FIJA bill in 1997. Tom also spoke to the *Drug Policy Forum of Texas* in

lished in the Texas Forum on Civil Liberties & Civil Rights, Winter 1995, Vol.2, No. 1, entitled "Jury Nullification as a Defense Strategy" This is a publication of the *University of Texas School of Law.*

Clay Conrad Texas FIJA Contact

LS-FIJA has also mailed its first ever state newsletter, the *Texas Juror.* Thanks to **Trey Summitt** for layout and production, **Mike Lenker** for mailing labels, **Richard Lee** and **Amy Doktor** for mailing, and Clay Conrad and Tom Glass for content.

Richard Lee Texas FIJA Contact

Several cases are pending of interest to LS-FIJA members. The cases in Houston are a case of ATF entrapment and a case of FDA meddling (**Dr. Burzynski**), and in Tyler, a hemp activist (**Kevin Aplin**) was arrested for possessing a legal substance (sterilized hemp seeds) while engaging in free speech near the courthouse.

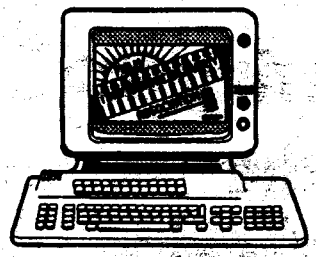
Kaylin Robinson Utah FIJA Co-Coordinator

Our Utah FIJA Co-Coordinator, **Kaylin Robinson**, was badly injured in a car accident, though she is thankfully recovering well. Cards are always appreciated. (P.O. Box 793, Riverton, UT 84065.)

WISCONSIN

F I J A O

Harald Illig of Salt Lake City has and linked them to various indexes. T fija_us.htm .



Clay lished a FIDONET OK, AZ, T 462-1776 World Wi lina reque they will The files Gopher. pub/Politics/fully-informed-juries; th

Bruce has also established a l sunsite.unc.edu/fija/fija home.htm .

R.J. Tavel has a FIJA Web site a

Dave Slack has established a FI access it, check Web page; http://ww tablished anonymous FTP files; FIJA /users/s/slack/fija.

STATE AND FEDERA

Richard Coursey's Jury Power downloadable masters, and a director eral trials. The address is http://www posted via e-mail at rcoursey@flash.n

In addition, FIJA will be listed in jury powers. FIJA information is also

David Rains, Moderator of NOR FidoNet echo dealing with FIJA. A 1011.12. He is also working on an Int

E-Mail addresses for FIJA activ

L.A. "Andy" Anderson has reti coordinator of the FIJA internet e-mail group, ask to be placed on the list as a r com. Contact Chuck Stewart at (503)

R.J. Tavel	rjtav
Steve Gordon	vote
Brian Esterson	fijan
James M. Ray	liber
Jeff Chase	cyl@

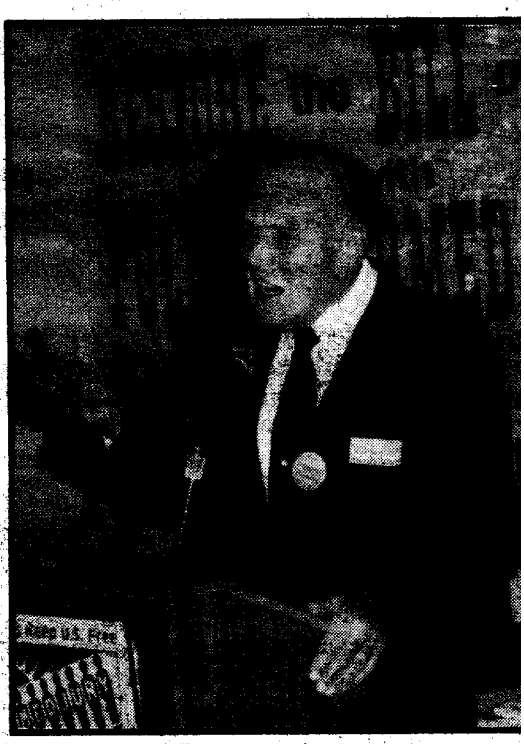
NOTE: FIJA HQ has updated fi are starting FIJA web sites, etc. Contri diskette.

Some web sites inevitably opera tion. For instance, FIJA's annual me are now $25 -- would everyone plea coordinators'/contacts' lists get old fas

CORRECTION: In the previous Jury Power Page was given rcoursey/www/index.html

Jury Nullificatio

Empowering the Jury as the Fourth Branch of Government



By Justice William Goodl
Washington State
Supreme Court, retired

with gratitude for the research Professors Alan Scheflin, Jon Van and Mark Howe, and for the cita verification by Tom Stahl

Of all the great trials in history tried at Old Bailey in London only one is commemorated by a plaque. Located near Courtroom Number Five it reads:

"Near this site William Penn and William Mead were tried in 1670 for preaching to an unlawful assembly in Gracechurch Street.

This tablet commemorates the courage and endurance of the Jury. The [illegible] Bushell [illegible] without food for two nights and were fined for their [illegible] a writ of Habeas Corpus and [illegible] Vaughan delivered the opinion of the court which established the Right of Juries to give their Verdict according to their conviction."

Lysander Spooner explained the doctrine in Trial By Jury in 1852, page one:

"For more than six hundred years - that is, since Magna Carta, in 1215 - there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge of the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resist-

Review 582, 591 (19

certificate, lists the

HISTORY OF JURY NULLIFICATION

The case commemorated is *Bushell's Case*, 6 Howell's State Trials 999 (1670). This case is a good beginning for tracing the roots of a legal doctrine known as jury nullification.

The year was 1670 and the case Bushell [illegible] was that of William Penn and William Mead, both Quakers, who were on trial for preaching an unlawful religion to an unlawful assembly in violation of the Con-

In 1735 in the colony of New York, John Peter Zenger, publisher of the *New York Weekly Journal*, was tried for seditious libel for printing articles exposing the corruption of the royal governor. This is perhaps the most important trial in American history because the jury in this case established the rights of freedom of speech and of the press in America by nullifying the seditious libel law which made it a crime to criticize public officials regardless of whether the criticism was true. The Zenger [illegible] cited by newspapers and history books across the [illegible]

story here.

To raise taxes [illegible] tion Acts requiring all through England so Smugglers, such as J defied the Navigatio into the colonies. The heroes so that when glers and they were rors acquitted the sm

Empowering the Jury as the Fourth Branch of Government

There are only 14 words describing freedom
the Constitution. But there are 186 words
Constitution. It is guaranteed in the main
Paragraph 3, and in two amendments,
No other right is mentioned so frequently
words devoted to it. It is plain that the F
right as the most important right since it
all other right

(Continued from page 5)

examining the words of the Constitution. There are only 14 words describing freedom of speech and of the press in the Constitution. But there are 186 words describing trial by jury in the Constitution. It is guaranteed in the main body in Article 3, Section 2, Paragraph 3, and in two amendments, the Sixth and the Seventh. No other right is mentioned so frequently, three times, or has as many words devoted to it. It is plain that the Founders viewed the jury trial right as the most important right since it gave birth to, and defended, all other rights. It should also be noted that trial by jury and jury nullification were common law rights at the time of the drafting of the Constitution and so are also included as rights retained by the people under the Ninth Amendment.

For anyone to assert after Zenger, the Navigation Act cases, the Declaration of Independence, and the great volume of language about the jury in the Constitution that the Founders would intend the jury to be a mere factfinder that must blindly follow the law as dictated by a judge is to fly directly in the face of logic and history. It is also to fly directly against the explicit words of the Founders about the jury's role.

"I consider trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's constitution."

Thomas Jefferson, drafter of the Declaration of Independence and Third President, in a letter to Thomas Paine, 1789, *The Papers of Thomas Jefferson*, Vol. 15, p. 269, Princeton University Press, 1958

"It is not only his right [the juror's], but his duty ... to find the verdict according to his own best understanding, judgment, and conscience even though in direct opposition to the direction of the court."

John Adams, first proponent of the Declaration of Independence and Second President, 1771
2 *Life And Works of John Adams* 253-255 (C.F. Adams ed. 1856)

"You [the jurors] have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."

And further:

"... It is established for law, That the Judges, how great soever they be, have no right to fine, imprison or punish a Jury for not finding a verdict according to the direction of the Court. And this I hope is sufficient to prove, that jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow subjects."

Andrew Hamilton, arguing to the jury, ibid. at 41

The trial judge gave the jury opposite instructions on all these issues, including the instruction that truth is no defense in a seditious libel case. The judge had even suppressed the evidence of the truth of the accusations against the royal governor published in the defendant's *New York Weekly Journal*. Andrew Hamilton vigorously argued to the jury against this suppression of the evidence.

"And as we are denied the liberty of giving evidence, to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, That the suppressing of evidence ought always to be taken for the strongest evidence; and I hope it will have that weight with you."

Andrew Hamilton, arguing to the jury, ibid. at 27, 28

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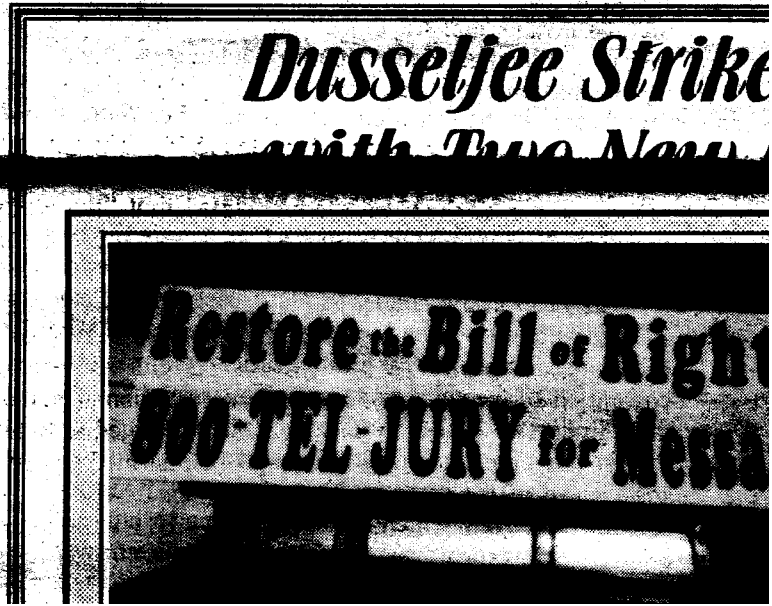

illustrates the power of arguing nullification as the persuasive way for the jury to consider it. England and France were at war and Congress had passed the Embargo Act forbidding American ships from trading with either of the combatants in an attempt to keep us out of war. Dexter argued to the jury that the Embargo Act passed by Congress was unconstitutional while the judge instructed the jury in opposite fashion that the Act was constitutional. The judge even threatened Dexter with contempt if he continued his nullification argument. Dexter stood his ground, continued his nullification argument and the jury acquitted.

"Judge Davis, of the federal district court, had instructed the jury that the law was constitutional. Dexter persisted in arguing the question of constitutionality to the jury, notwithstanding the remonstrances of the Bench. At length, Judge Davis, under some excitement, and after repeated admonitions, said to Mr. Dexter, that if he again attempted to raise that question to the jury, he should feel it his duty to commit him for contempt of Court. A solemn pause ensued, and all eyes were turned towards Mr. Dexter. With great calmness of voice and manner, he requested a postponement of the cause until the following morning. The judge assented ... On the following morning ... Mr. Dexter arose, and facing the Bench, commenced his remarks by stating that he had slept poorly and had passed a night of great anxiety. He had reflected very solemnly upon the occurrence of yesterday ...

... respect for the legitimate authority of those tribunals before which he was called to practice his profession ... but he ... arrived at the clear conviction that it was his duty to argue the constitutional questions ... sequences. Dexter made his argument and secured an acquittal despite the very obvious fact that the defendant had violated the terms of the statute."

Reminiscences of Samuel Dexter (1857) pp. 60-61 as quoted in Howe, *Juries As Judges of Criminal Law*, 52 *Harvard Law Review* 582, 606 (1939) and in Scheflin, *Jury Nullification: The Right To Say No*, 45 *Southern California Law Review* 168, 176 (1972)

Judicial Attempts to Control the Jury

As the Revolution and the Founders receded into history, judges began trying to limit the power of the jury in order to control the outcome of verdicts. In *United States v. Battiste*, 24 F. Cas. 1042 (No. 14, 545) (C.C.D. Mass. 1835), in the trial of a sailor who had served on a slave ship, Justice Story conceded the power of the jury to nullify his instructions but denied their moral right to do so. Justice Story had ruled as a matter of law that a statute imposing the death penalty for enslaving black people should not apply to mere sailors and he wanted the jury to follow his instruction. It should be noted that under modern rules of procedure jury nullification as in Battiste is avoided.

Throughout much of our history for the past 150 years there has been a tug of war in the courts over informing the jury of its power of nullification... This tug of war over jury nullification has also involved statutes and constitutional provisions.

one to help a fugitive slave. In one of the cases tried under this act, *United States v. Morris*, 26 F. Cas. 1323 (No. 15, 815) (C.C.D. Mass 1851) Supreme Court Justice Benjamin Curtis sitting as a trial judge in the case, interrupted the defendant's closing argument to reject the defendant's assertion that the jury could determine matters of law and acquit if they viewed the Fugitive Slave Act as unconstitutional. Despite judicial instructions upholding the

law, a statute was passed by the legislature in 1855 to overrule Porter. The statute read in relevant part "in all trials for criminal offenses, it shall be the duty of the jury ... to decide at their discretion, by a general verdict, both the fact and the law involved in the issue." Massachusetts Laws of 1855, c. 152. Justice Shaw ignored the obvious legislative intent of the statute and interpreted it in *Commonwealth v. Anthes*, 5 Gray 185 (1855) to mean only that the jury has the right to bring in a general verdict.

In Louisiana the early cases emphatically reiterated that in criminal cases the jury had not only the power but the right to disregard the judge's in-

Johnson, 30 La. Ann. 904, 905 - 906 the

tution, adopted in 1879, provided in Article 168 that "The jury in all criminal cases shall be judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge." But the court in *Ford v. State*, 37 La. Ann. 443, 465 (1885) interpreted this constitutional provision to mean that the jury was bound to follow the law as given by the

Empowering the Jury as the Fourth Branch of Government

"... it is a matter of common observation, that judges and lawyers, even the most upright, able and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences but to decide questions of law too unfavorably to the accused."

(Continued from page 7)

tion conferred upon it by the constitution."

Sparf, dissenting opinion, 156 U.S. at 154

"There may be less danger of prejudice or oppression from judges appointed by the president elected by the people than from judges appointed by an hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield, - from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law, - of amplifying their own jurisdiction and powers at the expense of those entrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy."

Sparf, dissenting opinion, 156 U.S. at 176

And also:

"... it is a matter of common observation, that judges and lawyers, even most upright, able and learned, are so times too much influenced by techni rules; and that those judges who wholly or chiefly occupied in the adm istration of criminal justice are apt, only to grow severe in their sentenc but to decide questions of law too un vorably to the accused."

Sparf, dissenting opini 156 U.S. at

The effect of *Sparf* has been to g a federal trial judge control over what jury hears about the law inside the co

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In 1968 the Court ruled in *Duncan v. Louisiana*, 391 U.S. 145, that the Constitution requires states to provide jury trials for all defendants facing a possible punishment of two years or more, and the Court strongly implied that it would later extend the jury trial right in state trials to all defendants facing a possible punishment of six months or more. Justice White, writing for the majority, gives some of the fundamental reasons why trial by jury is essential to liberty.

"A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government ... Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge ... Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence."

Duncan, 391 U.S. at 155-156

The community can hardly make an effective participation in the determination of guilt or innocence if the jury is told that it must disregard its conscience and follow the law as dictated by a judge. The very word "guilt" requires the finding of a guilty mind, *mens rea*, the evil intent to do harm, and the jury can not determine

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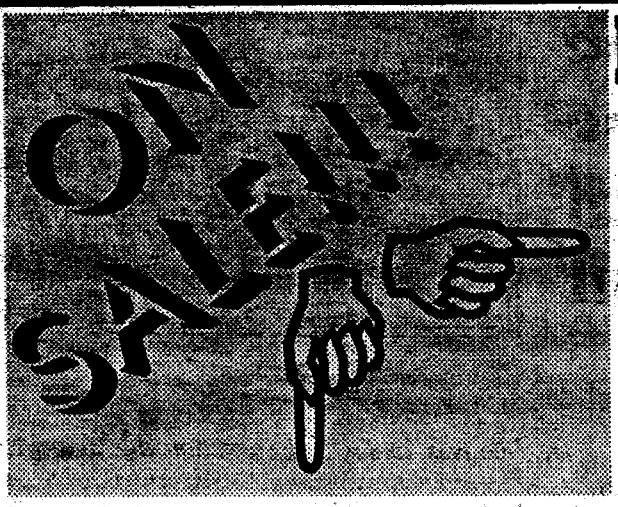

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Empowering the Jury as the Fourth Branch of Government

"Jury nullification has not produced chaos in history, but rather, it has given us juries which are representative of the verdicts which will cause anarchy and which the jurors reside. Hung juries because of jury nullification are actu They are sending messages to lawm institutionalized way that it is

(Continued from page 9)

this without consulting its own sense of right and wrong.

Modern Day Authority for Jury Nullification

Jury nullification remains the law of the land in every American jurisdiction. The ruling of Chief Justice Vaughan in Bushell's Case that the jury can not be punished for its verdict stands today in every jurisdiction, state and federal. This, coupled with the rule that verdicts of acquittal are final, is the substance of the power of jury nullification. Unless either or both of these two pillars of freedom are eroded away, the power of jury nullification is and will always be the law of the land. If the original intent of the Founders is our guide to the Constitution, then there is no doubt that jury nullification is a Constitutional right of both the defendant and of the jurors themselves, an unalienable part of the jurors' identity as sovereign citizens with the power to judge laws.

As the court has stated in *U.S. v. Moylan*, 417 F.2d 1002, 1006 (4th Circuit Court of Appeals, 1969):

"We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence ... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

In addition, the state Constitutions of Maryland (Art. 23), Indiana (Art.

but whether they should be told about their power. For example, in a Vietnam War protest case, *U.S. v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Circuit Court of Appeals, 1972), the court praises jury nullification:

"The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law."

And yet the majority on the court chose not to let the jury hear this praise in the courtroom.

ANSWERING COMMON OBJECTIONS

Some common objections to informing the jury about its power of nullification are that chaos and anarchy will result from inconsistent jury verdicts, that the jury will unjustly convict, and that it is the function of the legislature, and not the jury, to repeal laws. All of these objections are unfounded.

Jury nullification has not produced anarchy or social disintegration in history, but rather, it has given us our most important rights. Obviously, juries which are representative of the community will not want to render verdicts which will cause anarchy and chaos in the very communities in which the jurors reside.

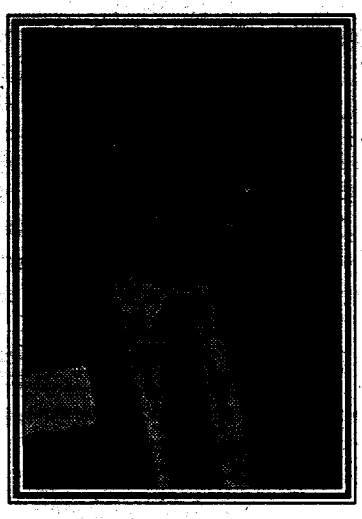
Hung juries and inconsistent jury verdicts arising because of jury nullification are actually performing a service for society. They are sending messages to lawmakers in a peaceful, routine and institutionalized way that it is time for

If the governor h veto, and the sen has a veto, and t house has a veto, the judges have t veto of judicial rev then the citizens w are asked to live u the laws and app them must also hav veto when they se on juries.

ther, the court as a matter of la aside a conviction or grant a where the verdict is unsupport evidence. The defendant can app dict of guilty but a verdict of a final.

Further, jury nullification threat to the reasonable doubt It is clear from the language in e opinions that the early Americans jury nullification to work only

government. "The purpose of th the preservation of civil liberties the undue bias of judges." Mar examining early American cases in *Juries As Judges Of Criminal Law*, 52 *Harvard Law Review* 582, 592 (1939). The recent jury nullification bills introduced in other states and the one introduced in Washington State, HJR 4205, follow early



The Jury's Business is Justice

A Re-Investigation of the Jury

By Harvey Wysong

[I]t is presumed, that the juries are the best judges of facts; it is, on the other hand, presumed that the courts are the best judges of law. But still, both objects are within your power of decision. You have a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

John Jay, First Chief Justice
United States Supreme Court
State of Georgia v. Brailsford
3 Dall. 1,4

A Chance Encounter

As my friends and I passed out literature at the courthouse steps in Atlanta, a young lawyer approached us. In his hand he held one of our brochures, which he had apparently read. *If only the jurors had known their own authority in one of his cases...*

The Lawyer's Story

The father of a young woman had been [illegible] when his panic-stricken daughter had called. Her "boyfriend" was beating her and [illegible]. The father, who lived nearby, rushed over to defend his daughter and was able to throw him out of the daughter's house. Then he locked the doors and windows. The "boyfriend" returned moments later with a piece of heavy chain as a weapon. Finding the door locked, he tried the window. And finding it, too, locked, he broke through it with the chain. And, during this time, he swore that he would kill them both.

The father, realizing that the heavy chain gave the young man a lethal advantage, went to his daughter's bedroom and [illegible] father of the young woman shot him dead.

The case was a clear matter of self-defense. Yet the father was convicted of murder and sentenced to life in the state prison.

In this trial the judge and jury were [illegible]

many years before, the father had been convicted of several instances of driving under the influence of alcohol. He had been declared a felon under the "habitual offender" statute.

Under Georgia law, the father was forbidden to possess a firearm, because he was a convicted felon. The court held that the law even prohibited the father from picking up the pistol to save his own life and that of his daughter. In other words, he was committing a felony *just by picking up the pistol.*

Georgia law also provided that any person who kills another during the commission of a felony cannot plead self-defense. Thus, the judge refused to allow the defendant to enter a plea of self-defense, and he further refused to allow the defense attorney to ask the jury to nullify the law. The intent of the law was to prevent a felon, such as a bank robber, from pleading self-defense in shooting the bank's armed guard. But this case was [illegible]

Empowering the Jury as the Fourth Branch of Government

(Continued from previous page)

policy behind jury nullification is the protection of civil liberties and in the past the [illegible] *out of the Legislative. The execution of the laws is more important than the mak-* *as by the common people of England, by the unknown juryman who in 1367 said*

The Jury's Business is Justice

A Re-Investigation of the Jury

(Continued from page 11)

proclaimed in the Declaration of Independence.

John Adams, a signer of the Declaration and the Second President of the United States expressed a belief in higher law in these words:

You have rights antecedent to all earthly governments; rights that cannot be repealed or restrained by human laws; rights derived from the Great Legislator of the Universe.

Any law or regulation of the State or Federal governments which violates the Constitution, or Natural Law, as expressed in the Declaration of Independence, is an unjust law and, therefore, of no effect.

All laws which are repugnant to the Constitution are null and void.

United States Supreme Court
Marbury v. Madison, 1 Cranch 137, 1803

So, where on earth did we get our rights? We didn't. There is no agent on earth competent to give us rights. Our rights came from the Creator and are as ancient as mankind.

Holding Government to the Bargain

Usually, vital knowledge is more who possesses it. Manufacturers' trade secrets are an example of this. Military intelligence is another. But the knowledge you gain from this article will be valuable to you only if you pass it on to others. This is the information that could preserve your life, liberty, or property should you be wrongfully accused of a crime. And, only if the jurors know their authority, can you expect them to exercise their right to protect you against wrongful laws, wrongful prosecution, or an unfair judge.

Every day in our courts, people's lives and freedoms are at stake. It is un-

times too much influenced by technical rules; and...are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.

Sparf and Hansen v. U.S
Dissenting Opinion
156 U.S. 51, 174

But, exerting similar pressures on all twelve jurors - whose names are not known until the time of trial - is *extremely* unlikely. Thus, a jury which is selected at random from the population is virtually influence-proof.

The history of all Government is a history of continuous warfare against individual rights. Everywhere on earth, in every year of recorded history, man's rights have been under attack by his own creation: *Government.*

The Founding Fathers of this Nation knew from study and from personal experience what the natural are. And this century proved that their fears were well founded. During the Twentieth Century, more people have been murdered *by their own Governments* than by foreign armies. (See *Death By Government* by R.J. Rummel). Once again Pogo's words ring true, *"We have met the enemy, and he is us."*

To prevent Govern-

John grew heavy handed, and the L of the realm grew rebellious. John sa his life by signing the Magna Cart A.D., 1215. Among the guarantees o Magna Carta was the right of the L to be tried by a "jury of their peers." principle was later accepted as the of commoners as well.

Trial by Whom?

The Sixth Amendment reads, in

In all criminal prosecutions, the cused shall enjoy the right to a spe and public trial, by an impartial jur the State and district wherein the cr shall have been committed....

Did you notice that the Amendm says "...a speedy and public trial, by impartial JURY....?" Anything which

Every day in our courts, people's lives and freedom at stake. It is unwise to on the belief that you will be the defendant in a crimind trial. Unfortu coincidences and sloppy forced many innocent pe to defend their lives a freedoms against the awe power of the State. And, one day, you may

the moon, it no longer had a clearly defined objective. The organization quickly fell apart, and its rockets tumbled from the sky. Its decline was so sudden, so dramatic that many Americans believed that Soviet sabotage was responsible. No, just human nature at work.

The U.S. Armed Forces in Vietnam fell to pieces. Not because of deficiencies in weapons or supplies. Not because the men in the field lacked character. But because of deficiencies in Washington, D.C.! From President Lyndon Johnson, Secretary of Defense Robert McNamara and the Congress on down, no one really knew what we were doing there. Lacking an objective, the Armed Forces quickly deteriorated.

"Everything rises and falls on leadership."

Rev. Lee Roberson
Highland Park
Baptist Church
Chattanooga,
Tennessee

How can we expect juries to do their jobs when they don't know what their job is? It's not a secret. Jefferson's quote above says it. And the Supreme Court recently affirmed it in three separate cases: Singer in 1965, Duncan in 1968, and Taylor in 1975.

I prefer the words of Justice White:

A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.

Justice Byron White
Duncan v. Louisiana
391 US 145, 155 (1968)

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and silence critics that the accused be given a speedy public trial by an impartial jury.

Justice Hugo Black
Singer v. United States
380 US 24, 34 (1965)

Trial by jury in criminal cases is fundamental to the American scheme of justice. Both the Fifth Amendment guarantee against prosecution except on the action of a grand jury and the Sixth Amendment right to trial by jury in criminal cases were designed to safeguard the liberties of the people against arbitrary action by the Government and its officers.

Justice Hugo Black
Duncan v. Louisiana
391 US 145, 147 (1968)

Trial by jury has been established by our decisions as an essential safeguard against corrupt or overzealous prosecutors and against compliant, biased, or eccentric judges.

Justice Byron White
Taylor v. Louisiana
419 US 522, 530 (1975)

Remember, the purpose of the jury for over a thousand years has been to prevent oppression and see that justice is done.

Can Juries Be Trusted?

Not if the jurors don't have the facts, don't know the law, and don't know their purpose.

But, if they *do* know these things, the overwhelming number of juries will return just verdicts. And that is their job: JUSTICE.

"Jury Nullification"

When the jury decides that the law itself is unjust or it is being applied improperly, this is called "jury nullification." Some judges and lawyers say that juries have no right to do this. Others say that juries have the right, but should not be told so. Still others say that juries should be told that they have the right.

Well, all the legislators and most of the judges in this country are elected. If citizens serving as jurors are not bright enough to understand the laws, how can they judge how well the legislators have done their job of writing laws? How can they judge how well the judges have administered the laws?

The citizens have the final say, whether in the voting booth or the jury room. And, if our citizens are not smart enough to satisfy the elitists, perhaps our government schools should start doing a better job of educating children - or, maybe, get out of education altogether.

And just how smart does a person have to be to know right from wrong?

It's amusing how the government's view of the Average Citizen changes to suit the Purpose of the Moment. When people are accused of crimes, they are presumed to have notice of and perfect understanding of [illegible] Every obscure line of The Law. But, when Average Citizen serves as a juror, he's presumed to be a

Law versus Politics

When we serve as jurors, we are usually told that we "must follow the law."

Oh? Why is that?

Is the law so sacred? Do we need a priest class called lawyers to read it for us and give us a Readers Digest version of it? Should we revere it?

The answers are: No. No. And Usually not.

Laws - like people - should be accorded the respect they have earned. [illegible] respect accorded to laws prohibiting murder, rape, theft, [illegible] laws which regulate inheritance, the ownership of property, and family obligations.

There are some obvious reasons why recent law seldom merits the same respect as laws long established. *First*, the vital topics were dealt with centuries ago. The issues that

The Jury's Business is Justice

(Continued from page 13)

John Peter Zenger was tried for publishing an illegal newspaper. Attorney Andrew Hamilton (not related to Alexander) asked the jury to nullify the law and declare Zenger not guilty. They did. And that verdict secured our right of Freedom of the Press.

Slavery

From the case of Jenny Slew in 1766 to the case of Quock Walker in 1783, Massachusetts juries returned verdicts declaring about 20 slaves to be free men and women. With the Walker verdict slavery was forever eradicated in Massachusetts.

In the 1850's juries throughout the non-slave states refused to enforce the Fugitive Slave Act and Article IV, Section 3, Paragraph 2 of the U.S. Constitution. The juries nullified both Federal laws and the U.S. Constitution!

In the late 1800's juries protected the right of laborers to organize unions, despite state laws which made it illegal.

And in the 1920's and 30's, juries frequently acquitted people who had violated the Prohibition laws. As a consequence of these "no confidence" votes, the 18th Amendment, which had authorized Prohibition, was repealed by the 21st Amendment in 1933.

Exceptions to the Rule

You might be wondering what other circumstances might compel a jury to find the defendant "not guilty" despite the facts and the law. Let's look at a few examples.

Is the punishment too severe for the crime?

In many cases today - especially drug cases - there are mandatory minimum sentences. If the defendant is convicted, he is automatically sentenced to life without chance of parole, or 30 years.

would be bound to enforce that law? No. That offends our sensibilities. We cannot be bound to obey a law of which we have not been given notice.

But, in the United States, *over 15,000 new laws are passed each year.* Is there any difference between passing 15,000 laws per year and passing laws in secret? No one can possibly know what his legal obligations are when there are 15,000 new laws each and every year.

The more corrupt the state, the more numerous the laws.

Tacitus
Roman Historian,
A.D. 55-117

That phrase, *"ignorance of the law is no excuse,"* might have made sense hundreds of years ago when the law confined itself to real crimes with real victims. Everyone knew that murder, rape, theft, and arson were crimes. No sensible person would accept the argument that the defendant was ignorant of the criminal nature of *those* acts.

But today, that phrase is used to hold each of us responsible for tens of thousands of laws which protect *government authority, not people*. It's time to abandon this Orwellian maxim and demand that our laws be governed by reason.

Ignorance of the law IS an excuse, if the jury says it is.

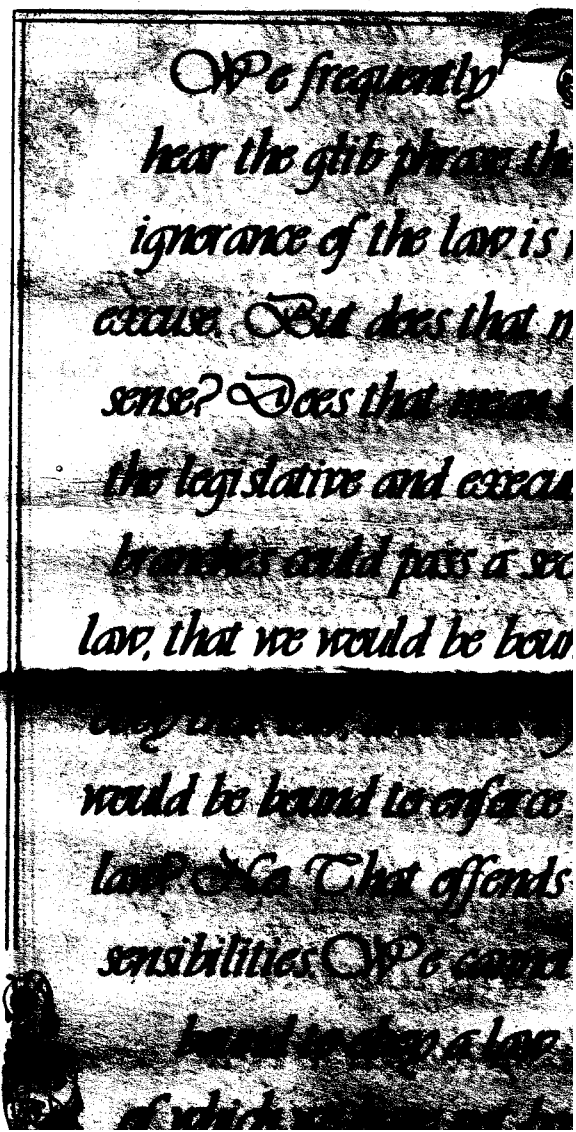
Can the law be understood by the average citizen?

This view was eloquently stated Judge David Bazelon of the D.C. Circ Court of Appeals,

The drafters of legal rules cann anticipate and take account of every co where a defendant's conduct is "unla ful" but not blameworthy, any more th they can draw a bold line to mark t boundary between an accident and ne ligence. It is the jury - as spokesman the community's sense of values - th must explore that subtle and elust boundary.

U.S. v. Dougher
473 F.2d 1113, 114
D.C. Circ. (197

Is the Government exceeding its authority, violating the Constitution, violating common decency?


So frequently
hear the glib phrase th
ignorance of the law is
excuse. But does that
sense? Does that
the legislative and execu
branches could pass a
law, that we would be bou
would be bound to enforce
law? No. That offends
sensibilities. We cannot
bound to obey a law

jury, you'll have to decide.

True crimes are evil at all times in all places. Murder, rape, theft, arson, and battery are examples. Manufactured "crimes" depend on the time and place. Take for example Government's elastic view on gold and whiskey. After the 18th Amendment (Prohibition) was passed, a man walking down the street with some gold coins in one hand and a bottle of whiskey in the other could be arrested for the possession of whiskey. But, during 1933, Prohibition was repealed and the private ownership of gold was made illegal. That same pedestrian could then carry the bottle of whiskey without fear, but he could be arrested for possession of the gold coins.

Does the law or the enforcement of it violate the Fourth Amendment?

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Jury's Awesome Power

The jury can acquit the defendant for any reason that seems sufficient to them. [illegible] no obligation to explain their verdict to anyone but God.

But jurtes are not bound by what seems inescapable logic to judges.

Justice Robert H. Jackson
Morisette v. United States,
342 U.S. 246

And, in criminal trials, a conviction may be

should, at least, be required to let the jury understand the exact nature of the witness' testimony.

First, the court should calculate the market value of the witness' testimony. One way they could do this by taking the amount of time by which his prison sentence will be reduced and multiplying it by the amount of money he can be expected to earn in that time. Then the prosecutor would be required to pay the witness that amount of money while the jury looked on.

The defense attorney should also be allowed to itemize for the jury all the other means of coercion which the government had at its disposal in dealing with

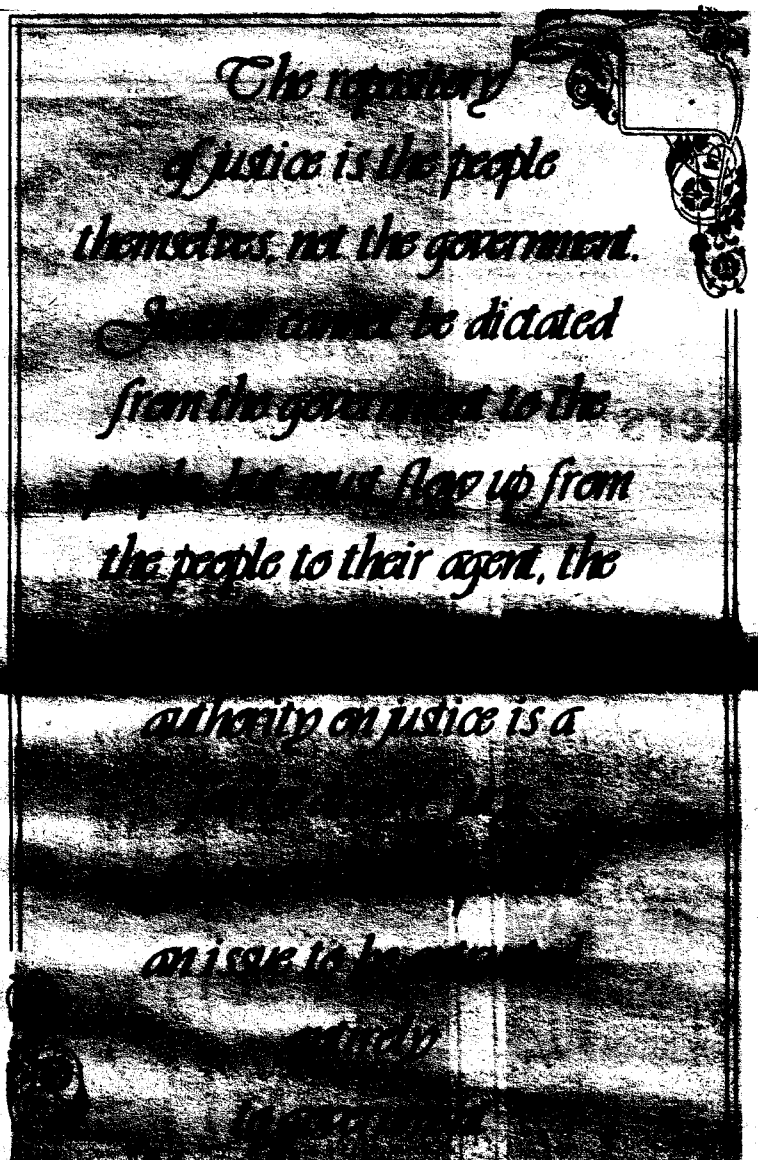
copiers, cleaned office buildings, written weekly paychecks, cared for the sick, sold clothing, performed statistical studies, waited tables, painted houses, repaired automobiles, designed bridges, piloted airplanes, fought fires, sold real estate, taught children, tended bar, or roofed houses. And each year which they spend on the bench further isolates them from the ordinary experiences of other men and women.

No one person can embody the collective wisdom of the entire population. "Justice" is a societal concept born of the commonly held beliefs of the individuals who comprise that society. And the repository of justice is the people themselves, *not the government.* Justice cannot be dictated from the government to the people, but must flow up from the people to their agent, the government. The foremost authority on justice is a fairly drawn jury.

Justice is too important an issue to be entrusted entirely to government employees.

Civil liberties had their origin and must find their ultimate guaranty in the faith of the people.

Justice Robert H. Jackson
Douglas v. Jeannette,
319 US 157, 182 (1943)



If anyone is to blame for the deplorable condition of justice today, it is you and I. Our disinterest, our naivete', and our lack of courage

responsibility to correct it.

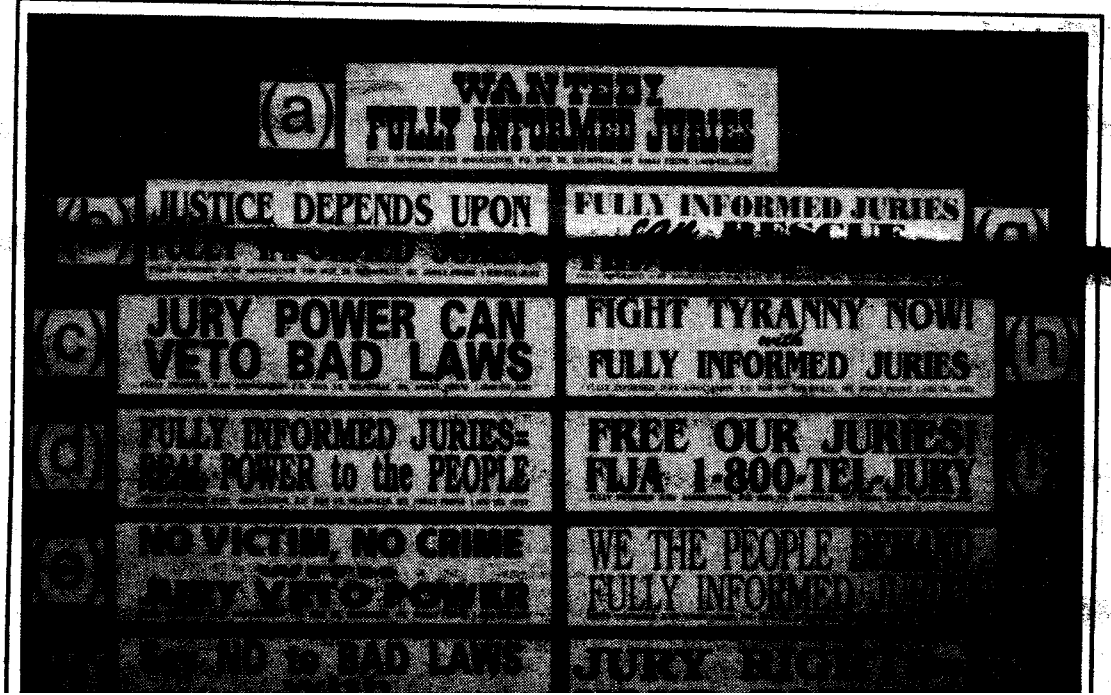
The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings.

William Shakespeare,
Julius Caesar

Your judges and legislators - if made aware of this issue - may very well be supportive. But, *if you and I don't care and won't fight for our rights, why*

Dallas businessman
Tracy Lanham
models FIJA
"Bill of Rights" t-shirt

The FIJA Bumper Stickers



FIJA

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HELP IT HA

WHY

1] you become part of
to two of America's mos
in our courtrooms, and
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2] you will receive the
which is filled with new

3] you can deduct wh
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FIJA is a tax-exempt, n
organization!

SO... AR
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AND JUST

YES! I'

I want to [begin] [rene

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I NEED

Code Item Description

Texas Juror [Lone Star FIJA]
Summer 1996

Surviving Jury Voir D

By Clay S. Conrad

How can LS-FIJA members keep from getting kicked off of juries, by the Judge or by the Prosecutor? Frustrated FIJistas regularly report being excluded during voir dire (jury selection). But if our advocates can't get seated on juries, FIJA is limited in its ability to affect the law, or to see justice done in SPITE of the law.

Voir Dire, which is French for "to speak the truth," consists of having the Judge, the Prosecutor and the Defense Attorney each ask the jury a series of questions. It exists for two reasons. First, it allows the Court to find and eliminate partisans - the Defendant's brother, the arresting officer, etc. It also allows both sides to challenge jurors for bias, for familiarity with facts or witnesses, etc.

The rules for exclusion of jurors are spelled out in the Code of Criminal Procedure (CCP). First, FIJA members should realize that some veniremembers are absolutely disqualified. For instance, if a veniremember is under 18, or is not a citizen of Texas, the veniremember may not legally serve. The Court is required to exclude such jurors from service. More importantly, veniremembers may be challenged FOR CAUSE. These challenges are unlimited in number, and are spelled out in CCP Art. 35.16. A juror may be challenged for cause if he:

1. Is not qualified to vote;
2. Has been convicted of a theft or felony;
3. Is under indictment or other legal accusation for a theft or felony;
4. Is insane;
5. Has "such a defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind, and the Court in its discretion is not satisfied that he is fit for jury service in that particular case";
6. Is a witness in the case;
7. Served on the Grand Jury which indicted the defendant;
8. Served on a Petit Jury in a former trial of the
9. or the Defendant;
10. Has established a conclusion as to the guilt or innocence of the defendant that would influence him in his action in finding a verdict;
11. Cannot read or write;
12. Is related to either the defendant or the victim;
13. In a capital case, has conscientious scruples in regard to the infliction of the death penalty (only to be used by the Prosecution); or
14. Has a bias or prejudice against any of the law applicable to the case.

If the Judge finds the challe
he MUST exclude the juror. It is n
failure to exclude will be reversib

Additionally, both the Prose
Defense have a limited number of
CHALLENGES. In a misdemeano
sides have three, in most felonies
capital cases, both sides have fifte
challenges may be exercised for a
no reason whatsoever, EXCEPT th
be used to exclude women or min
jury merely because of their gend
CCP 35.261, Batson v. Kentucky, 476
Attorneys use peremptory challe
"stack" the jury in their favor by excl
jurors they feel could be hostile t

Many lawyers believe that the
of peremptory challenges is the m
skill of a good trial lawyer; yet rese
few lawyers are good at it. Perhaps th
to be glad about; try as they may,
not be so plainly "defense" or "pros
that voir dire is much better than
certainly is frustrating for a venire
especially a FIJA member, to be ex
jury duty. They have taken time fr
submitted themselves to questioni
been rejected. Yet FIJA members
their keen eagerness to blame for
as I have tried to explain in my an
Mail post below.

[The following exchange of p
appeared on the FIJA echo I mode
BBS in Austin, Texas (the board ca
directly by dialing 512-462-1776; th
found on various FIDOnet bulleti

From: LOT ZIGLER
To: all Msg 843, May-16-96
Subject: fija

LZ> The FIJA got me out of jury

<G> The woman says the transcrip
dismissal will be mailed out next
need to decide what the next step

(Continued on colla

continued from page 3

It came today. What about this:

Judge: Is there anyone here that believes that they should not follow the instructions of law given to them by the court.

Me: Yeah, I guess I do. You mean the fully informed Jury?

Judge: Hold on, sir. I don't want you to taint the panel. I'll just ask you a couple questions.

he asked my name and juror #

Judge: okay, Mr. Zigler, you heard me explain--you believe that you would not --- and you have to answer yes or no, because I don't want to taint the panel. You would not be able to follow the instructions of law given to you by the court? Just answer yes or no.

Me: Depends if I think the law is legal.

Judge: Well, all right. And I'm saying to you, it's not your judgment of what the law may be. The court's responsibility to tell you what the law is

Me: Not if I'm in a jury. It's my responsibility.

Judge: Okay, well, I think we've heard enough from you, sir, in terms of your responsibility. You're not giving me direct answers. The answer I'm asking you is if you say to yourself and tell me, "Judge, I know you have responsibility to tell me what the law is, but the fact that you've told me what the law is isn't going to change my mind at all. I believe that I have an absolute right to determine what the law is." Is that your position?

Me: That's right.

Judge: All right. Thank you. Then we'll excuse number 48. Report back to the jury commissioner. Okay, We're not--- we're not being incriminatory to anyone or condemning anyone's beliefs, but that's the only way we can operate.

[illegible]

Now think of this in light of John Adams, our second president, who had this to say about jurors... "It is not only his right, but his duty... to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."

In 1895, the U.S. Supreme Court formally recognized jury nullification in Sparf vs. United States. The court held that juries have the power to return verdicts contrary to law and evidence.

Taken from the Arizona Republic by Richard Lessner Deputy Editor of the Editorial Pages.

I was denied the right to serve on a jury by this judge and would like to know where I should go to file a complaint.

the jury.

In voir dire, if you intend to serve, the less said, the better. And if you do want to make a speech in voir dire, it should be aimed at informing the other jurors as much as possible.

Finally, the juror does not determine what the law IS, so much as he determines whether the law should or should not be applied in the case before him.

Even the best laws can be misapplied, and when misapplied should be nullified. There is no human way to write a law so complete and perfect that an ambitious prosecutor can't find an excuse to charge a morally innocent person with its violation...

As for any "violation" of your rights because you were excluded as a juror, don't waste your time. The rights involved belong to the people on trial, not to the jurors, with one exception: racial or gender discrimination in jury selection ("Batson" violations.) The Court has every right to exclude someone who has made themselves excludable under the Code of Criminal Procedure. I don't know the specifics for your state - or even what state you are in - but I do know enough to assert that any Court in America will exclude a juror who answers as you did!

HINT: NEVER mention FIJA in voir dire.... NEVER answer more than the bare minimums. If the judge asks if you "CAN" do something, always answer yes if the action would be physically possible to you... he didn't ask if you WOULD...

After you are seated, if you believe nullification is an appropriate response, tell the other jurors that you do not believe the defendant is guilty, because you don't believe the law should be applied in this case, and tell them why. Then try to show them that they have the power to do what is right, and that that is why we have trial by jury. Don't quote, don't rely on authority. They can't check your quotes or look at the authorities.

Talk to them as one individual to another (11), and put the doctrine in your own words. Convince the other people prone to vote to acquit that a hung jury is not a bad outcome, if the panel disagrees. A compromise - voting for conviction when not convinced beyond a reasonable doubt, or voting guilty on lesser charges in order to short-circuit the process and go home - IS a bad outcome, and is [illegible] such a violation of their duty. Jurors have given you all the ammunition you need, while in closing arguments, voir dire, etc. E-mail [illegible] for the booklet on "Jury Nullification" or a [illegible] for more information.

COURTS DO NOT LIKE TO EXCUSE JURORS. What they want to avoid is "busting the panel," excusing so many jurors for cause that they don't have enough left to try he case. If you avoid a dogmatic posture, and if you are respectful and say the minimum, chances are the Court will not find cause to excuse you. (You may still be struck with a peremptory challenge; even if you had not been struck for cause, I am sure, in your case, that the prosecutor would have sent you out of their expeditiously anyway. So, so far as you were concerned, there was no harm done.)

Let me give you a few examples of how the answers could have gone.

The Modesto B

Friday April 12, 199

Sacking jury service?

Grocery bags off tips for avoidanc

By Rose Albano
Bee staff writer

MANTECA — Want to ge of jury duty?

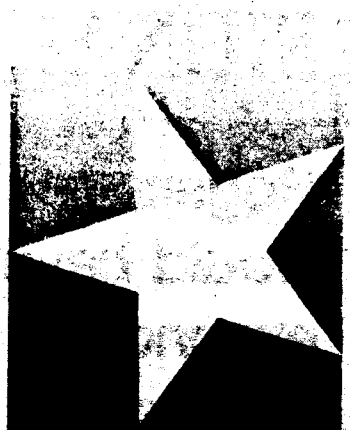
Just follow the instruct printed on the sides of the b paper grocery sacks hande at Cheaper! discount [illegible] "How to Get Out of Jury D the title of this month's "ba rial" printed on a million at 83 Cheaper! outlets, inclu one here, in Atwater and T

Cheaper! owners Ned John Roscoe are the autho the opinion piece which d heavily from the beliefs o Fully Informed Jury Associa a group out of Helmville, M

"We don't really encou people to get out of jury but if they did want to get o they have to do is tell the j that they've heard of FIJA that they believe that they the right to judge the law not just the facts," said Doig, a founder of the group seeks "to expose the [illegible] [illegible] power." Doig's [illegible] about 25 miles south of Lin where Unabomber suspect [illegible] [illegible] [illegible] who serves on a jury h power to veto laws. ... If mention this power before are selected for a jury, you almost sure to be excluded the list of potential juror very long time."

Doig says the Roscoes co ed him and said they wan promote the group's cause.

Can someone really get o jury duty by bringing one o bags to the courthouse for selection? Ned Roscoe sa



Just remember that a criminal trial is not the place for political grandstanding or membership recruitment. Our goal here is not to convert, not to show off, and not to challenge the authority of the Judge or Prosecutor, but to see JUSTICE done. Keep your eyes on the prize, and when you get on that jury, do the right thing!

FIJA jurors can't know whether they should follow the instructions of law until they have heard the case and the instructions. AS A GENERAL RULE, the instructions probably SHOULD be followed. We should assume the system to be just until proven otherwise. So we should, AS A GENERAL RULE follow the instructions of the court, and therefore I would not raise may hand in response to this question.

2> Judge: okay, Mr. Zigler, you heard me explain- - you believe that you would not --- and you have to answer yes or no, because I don't want to taint the panel. You would not be able to follow the instructions of law given to you by the court? Just answer yes or no.

FIJA jurors would be ABLE to follow the instructions; whether they WOULD do so is another question, and not one the court asked. So the answer to this is no, it is not true that you would not be able to follow the instructions... got it?

3> Judge: Well, all right. And I'm saying to you, it's not your judgment of what the law may be. The court's responsibility to tell you what the law is.

LZ: Not if I'm in a jury. It's my responsibility.

Here, you are being combative, when if you had answered either of the above questions more discreetly, this question would never have been almost asked - I say almost because you never let the Judge finish.

And you are WRONG. It IS the court's responsibility to tell you what the law is; it is your responsibility to decide whether the law should be applied - whether to convict or acquit.

4> Judge: Okay, well, I think we've heard enough from you, sir, in terms of your responsibility. You're not giving me direct answers. The answer I'm asking you is if you say to yourself and tell me, "Judge, I know you have responsibility to tell me what the law is, but the fact that you've told me what the law is isn't going to change my mind at all. I believe that I have an absolute right to determine what the law is." Is that your position?

LZ: That's right.

This is a misstatement of the jury nullification doctrine. The juror does not have an absolute right to determine what the law is in every instance. For [illegible] Court's [illegible] right to CONVICT. Nullification is a doctrine of mercy, not of anarchy.

Secondly, the juror should listen to what the Court says; he should not determine before hearing what the court says that it won't change his mind at all. Many jurors may have their minds changed and decide TO nullify after hearing the Court's charge.

Even worse, your answers were unenlightening to the other jurors. They probably just dismissed you as a kook, without knowing why you were being so adamant or what you were being adamant about. You speak of your responsibility, without explaining anything about that responsibility: a better answer (for someone who wanted off the jury) would have been: it is my verdict, your honor, and that is a

THEN the Court would have to deal w a jury of nullifiers, or dismiss the e - a wasted day in Court, which the Judg want to have to deal with...

The most important thing, in the en DEFENDANT. Did your attitude and actio more or less likely that he would have one potential nullifier on his jury? I less likely - you got kicked off - and have been unjustly convicted.

Perhaps remembering that a morally i may well be sitting in prison, being b and raped by his cellmates while his wi divorce papers against him and his fami welfare may somewhat blunt your sense righteousness in so belligerently chall Court.

Without having to have told one lie i you could have arranged to have been sea case - just say the minimum and answer candidly, but precisely! And that man - of the system - would still have his li piece. Think about it...

Consider what is at stake here. A FIJ may choose to spout off in *voir dire*, in teach that pesky judge a thing or two.. she may choose to wait until jury delib start, and then REALLY teach the judg or two... Which is more effective? Which would you want the veniremember to ta were on trial?

FINAL COMMENT: I AM NOT ADVOCATING HAVING ANYBODY E UNDER ANY CIRCUMSTANCES, LIE *VOIR DIRE*.

If you are forced to announce that FIJA member (Have any of you ever he Fully Informed Jury Association?), adm answer very, very carefully... if asked if member of the organization, but have officially joined, or if your dues have la answer would be NO. Say nothing!

And if you must answer a question lead to your being excluded, blurt out about the doctrine as you can! Try to m that every single veniremember knows as possible about jury independence, a under NO circumstances must a jury c

the judge to send them all home, and even get seated on the jury (the judge embarrassed to disqualify a juror who he believes in justice, and count on the F to use a peremptory challenge on you.

I am only discussing criminal cases rules for civil cases are similar, but not Jury nullification plays a much smaller than in criminal cases, and there is mu opportunity for oppression by governme cases, because Government is not routin to the case. For these reasons I am conc solely on the Criminal rules.

Wilkes-Barre Times Leader
July 19, 1996

THE SANTA CLARITA VALLEY'S O
THE

Local Guest Commentary

SUND
June 30, 1

Jury can weigh justice along with law

By WILLIAM LEVINSON

"... the law is an ass, an idiot."
Mr. Bumble in Charles Dickens' Oliver Twist

Frank Leeland asks in his letter to editor ("Justice is held hostage by legal murkiness and manipulative lawyers," July 3), "What is the proper role for our court (system) to play in our legal justice system? Is its primary function to follow laws, even if flawed, or to dispense justice?"

He cites the recent $40 million judgment against Bernhard Goetz as an example of problems with the legal system. This is just one example of New York City's version of justice.

In another, a mugger was beating an elderly man in a subway when a transit police officer saw him. The mugger turned to run and the officer shot him in the back. The officer's action was legal under New York's laws, as I understand them. Nonetheless, the mugger sued the city and won a multimillion dollar award.

William Levinson

The elderly victim learned of this and successfully sued the criminal. He then returned the money, less the two lawyers' contingency fees, in the spirit of gratitude for the police officers' timely [illegible].

We've also seen a multimillion dollar award from "Big McPockets" to a customer who spilled hot coffee on herself. This leads to the question, "Where do they find these juries?" To [illegible] know more about the system.

A jury's function is to dispense justice in [illegible] both the law and the judge's instructions.

> "Had I been on the Goetz jury, I would have refused to convict him."

For example, an English jury refused to convict William Penn for preaching Quakerism, an illegal religion. During the 19th century, American juries refused to convict people who hid runaway slaves. The jury "nullifies" an unjust or selectively enforced law by refusing to enforce it.

How might this apply today? During the 1980s, a New York jury convicted Bernhard Goetz of a felony for carrying an unlicensed handgun. In our state, a productive, law-abiding citizen like Goetz could have followed the rules and obtained a gun permit. This was, and is, not true in New York City.

Furthermore, judges in New York and Washington, D.C., ruled that police have no duty to protect individual citizens. New York put this ruling into practice a few years ago, when rioters trashed Crown Heights and the police didn't come.

During the Los Angeles riots, police similarly told victims, "You're on your own." People who are on their own, like [illegible] the Wild West, need guns.

These judges would, to repeat their high school American history classes. Most high school students learn that a government derives its authority from a social contract. In return for its citizens' [illegible] the government agrees to [illegible]

When a government abdicates its duty to protect its citizens' natural [illegible] it forfeits their obedience.

[illegible]

Many parts of the Communications Decency Act (CDA) would be candidates for jury nullification, if a federal court hadn't ruled the entire law unconstitutional. Congress can grandstand and pass whatever it wants, no matter how unreasonable or irrational.

This doesn't mean that jurors have to enforce the legislation.

Wouldn't it lead to anarchy if juries did whatever they wanted? Might juries allow murderers and rapists to escape justice? It's easy to find people who would refuse to enforce New York City's gun laws or the CDA. Few believe that violent crime, theft, and so on are acceptable. July nullification can, in fact, prevent criminals from escaping justice.

I recall that one of the LA rioters who beat Reginald Denny escaped conviction because of the judge's faulty instructions. The judge told the jury that the only available verdict was attempted murder. I recall that the prosecution had a videotape of the defendant beating Denny with a brick, but it couldn't prove that he intended to kill Denny.

The judge's instructions, therefore, forced the jury to acquit the defendant. If the jury believed that the defendant wanted to hurt Denny badly instead of killing him, it should have hung itself to force a retrial. The next judge might have included aggravated assault in the next jury's options.

I am not a lawyer, and this is not legal advice. Most of it is, however, common sense.

For more information, contact the Fully Informed Jury Association (FIJA) at 800-TEL-JURY.

If you have access to the Internet, go to http://[illegible]

[illegible] gineer and author of 'The Way of Strategy,' a book on management and business [illegible]

Bangor Daily News
Feb[illegible], 1996

Judge hears slate of motions in Don Christen 'brownies case'

By Sharon Mack

charge of possession of marijuana

the steps of the Somerset County

Christen, who also faces charges

Canadian Lawyer February 1996

BACK PAGE

Fully Informed Juries: A Check on State Power

By Karen Selick

WHAT DO THE TRIALS OF Robert Latimer and Paul Bernardo have in common? Obviously, both resulted in murder convictions. But there is also a more subtle similarity. In both cases, it appears the jurors may have bent the law just a little, allowing themselves to arrive at a more palatable verdict than a strict application of the judge's directions would have permitted.

Latimer was convicted of second-degree murder in the death of his disabled 12-year-old daughter, even though there was ample evidence to support a verdict of first degree, and even though the prosecution may have tried to screen out jurors who would be sympathetic to the idea of mercy killing.

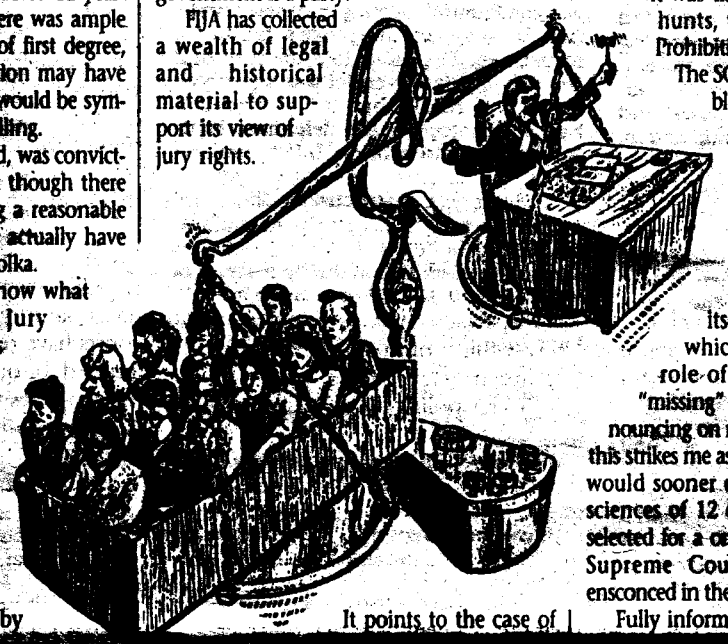
Bernardo, on the other hand, was convicted of first-degree murder, even though there was plenty of evidence raising a reasonable doubt that the murders might actually have been committed by Karla Homolka.

We will probably never know what actually went on in those jury rooms; it's an offence for jurors to reveal their deliberations. Maybe they genuinely believed Latimer didn't plan Tracy's death in advance and Bernardo really was the one who killed Leslie Mahaffy and Kristen French. But it's also possible they were so sympathetic to Latimer's predicament and so revolted by [illegible] that they simply decided, individually and collectively, to ignore what the judge had told them about the law and act in accordance with their own perceptions of right and wrong.

If so, then they must have figured out for themselves that they had this power. The Supreme Court of Canada (SCC) made it clear in its 1988 *Morgentaler* decision that counsel must not invite a jury to disregard the law. While acknowledging that juries have the *power* to ignore what they consider bad law, the court insisted there is no *right* to do so; therefore, the court concluded, they cannot even be told about their power.

The SCC cited both English and U.S. cases in support of its position. Since 1989, however, a non-profit educational organization in the U.S. has been challenging this interpretation of the law. The Fully Informed Jury Association (FIJA) maintains that, traditionally, common law juries had an absolute and well-recognized right to judge not only the facts of a case but also the morality of the law. FIJA's goal is to ensure that jurors are made aware of this right in every trial where the government is a party.

FIJA has collected a wealth of legal and historical material to support its view of jury rights.



It points to the case of [illegible] of Pennsylvania, who in 1670 was tried in England for preaching the outlawed Quaker religion. Although he was clearly guilty, four jurors refused to convict, expressing their disapproval of an unjust law. The jurors themselves were fined and imprisoned without food or water for days. The decision to release them (in *Bushell's Case*) established the principle that jurors could not be punished for bringing in an "incorrect" verdict.

By the time of the American Revolution, jurors clearly had not only the power but the right to nullify what they felt was bad law by refusing to convict. John Jay, the first Chief Justice of the U.S. Supreme Court, personally instructed jurors of this right. Other commentators of the time extolled this function of the jury as an important check on the power of the government. Four states even wrote it into their constitutions.

FIJA asserts that jury nullification has helped reform many bad laws. When juries repeatedly refused to convict people for being witches, for failing to return runaway slaves to their owners and for selling alcoholic beverages, they sent a message to legislatures that it was time to end the official witch hunts, the Fugitive Slave Law and Prohibition.

The SCC said it would be irresponsible to let a jury, in the words of one U.S. court, "carve out its own rules of law." Considering the inordinate power that Canada's Charter of Rights has handed to judges to override both legislatures and the Charter itself, and the easy manner in which judges have assumed the role of lawmakers — by reading "missing" words into statutes and pronouncing on matters not directly in issue — this strikes me as elitist hypocrisy. Personally, I would sooner entrust my fate to the consciences of 12 ordinary citizens, randomly selected for a one-time only event, than to 9 Supreme Court justices, permanently ensconced in their positions by political flat.

Fully informed juries will not necessarily [illegible] FIJA's [illegible] that of Paul Bernardo's, jurors might well decide to be more severe. The U.S. states whose constitutions guarantee the right of juries to judge the law have not experienced a problem.

FIJA would prefer that judges be required to inform jurors of their rights at each trial, but for practical purposes this is not strictly necessary. For FIJA to succeed, it is sufficient if even one member of each jury has read its literature, or an article like this one, and can inform the other jurors of their rights.

To contact FIJA, write P.O. Box 59, Helmville, MT 59843, phone 1-800-TEL-JURY or visit the Web site: http://www.calyx.com/~fija/.

CHARLES WEISS

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Jury Nullification: When Jurors Leave the Law Behind

One of the U.S. justice system's best-kept secrets is being leaked to the general public: Jurors do not have to follow the law.

While trial judges continue to read out traditional instructions that emphasize the juror's oath to follow and apply the law, a growing number of prospective jurors come to the courthouse knowing that if they don't like the law, they can ignore it. Spurred by acquittals in recent high-profile cases, legislators, attorneys, judges, and law professors are debating the controversial issue of jury nullification.

Nullification occurs when a jury refuses to convict a defendant even though the evidence seems to allow no other conclusion but guilty. The constitutional prohibition against double jeopardy makes the jury's acquittal irreversible.

The jury's power of nullification can be traced to medieval times. It was codified into English law after jurors in 1670 ignored a trial judge's instructions and voted to acquit William Penn of unlawful assembly. Nullification in American courts dates back to the colonial period [illegible] of dissident John Peter Zenger on charges of libel. Later, northern juries nullified fugitive slave laws while southern juries nullified laws governing treatment of slaves. The U.S. Supreme Court recognized that judges have no recourse if jurors acquit in the face of overwhelming inculpatory evidence. (*Sparf and Hansen v. United States*, 156 U.S. 51 (1895).)

Some people think that widespread knowledge of a jury's power to nullify the law could lead to anarchy. Others openly advocate nullification as a means to correct social inequity. Trial attorneys are caught in the eye of the storm, forced to cope with a justice system that accurately reflects [illegible] underlying tensions and contradictions.

Fletcher Baldwin, a former civil rights lawyer who is now a professor of constitutional law at the University of Florida, is unsure whether the O.J. Simpson verdict [illegible] of nullification, but cation. In the past it's usually been all-white juries that nullified the law."

Baldwin referred to convictions tainted by extreme racial prejudice. These were more common before World War II than they are now, after changes in the law made it easier for unfair convictions to be reversed on appeal. Today's nullification issue centers on acquittals.

Several justifications for jury nullification have been cited. Consider, for example, a scenario in which a law makes

Most judges don't tell juries they can nullify the law.

it illegal to cross a street. The prosecutor has five witnesses who saw X, who is black, cross the street and a videotape showing him crossing the street. The jury is asked to decide whether he is guilty of breaking the law. The jury finds him not guilty because—

- jurors think *the law is unjust.*
- the penalty for breaking the law is a mandatory two years in jail, and jurors think the penalty is severe.
- 15 percent of the population in this town, 70 percent of people charged with cross-[illegible]
- of all the people who end up in jail for crossing the street, nearly 90 percent are poor or black, suggesting that *the trial process favors wealthy or white defendants.*
- crossing the street is fundamentally a social problem, and *criminal enforcement masks the real need for effective social programs.*

To transform the fictional scenario into reality, simply change the focus from crossing the street to drug possession, prostitution, battered women killing their abusers, or illegal anti-abortion activities.

"Citizens who serve on juries have a [illegible] win. "There are exceptions, but not enough to eliminate the practice of jury nullification."

Subverting the System

A more extreme view of nullification is advocated by former federal prosecutor Paul Butler, now an associate professor at George Washington University Law School. "African American jurors should approach their work cognizant of its political nature and of their prerogative to exercise their power in the best interests of the black community," he wrote in a recent essay. (Paul Butler, *Black Jurors: Right to Acquit?* Harper's Magazine, Dec. 1995, at 11.)

Butler wrote that the black community would be better off if some nonviolent lawbreakers remained in the community instead of being sent to jail. "Imagine a country in which a third of the young male citizens are under the supervision of the criminal justice system—either awaiting trial, in prison, or on probation or parole. Imagine a country in which two-thirds of the men can anticipate being arrested before they reach age 30." This police state, Butler suggested, is Black America.

Speaking at a January 23, 1996, conference sponsored by the Annenberg Foundation in Washington, D.C., Butler said he would advise black jurors to make [illegible] ed their predicament with that of American revolutionaries and fugitive slaves. "There is no question that jury nullifi- [illegible] is a [illegible] legitimate exercise of the right to engage in this subversion."

Butler proposes that black jurors hold a presumption in favor of nullification when deciding the fate of black defendants charged with nonviolent and victimless crimes, such as drug possession.

Jury Instructions

Because nullification can be such a disruptive issue, most judges are reluctant to inform juries that they have the power to nullify. Federal Judge Jack Weinstein

If the law doesn't fit, then the jury can acquit

The Telegraph
Nashua, New Hampshire
April 29, 1996

■ N.H. juries can pass judgment on the laws themselves.

By ANDREW WOLFE
Telegraph Staff

NASHUA — As the years pass, old ideas sometimes come to sound subversive. Take the New Hampshire Constitution, adopted in 1784.

Unlike its federal counterpart, New Hampshire's Bill of Rights comes first. Article 10 proclaims the Right of Revolution, concluding: "The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind."

See NULLIFY, Page 15

Nullify

■ From Page 1

Fiery words, those.

Older still, and no less radical, is the notion that juries have the right to pass judgment on the law itself, and not just the facts of a case. The concept is called jury nullification.

Jury nullification is the right of a juror — or a whole jury — to decide cases solely on conscience. If jurors believe a law is unjust, or unfairly applied to the case at hand, they can acquit.

Jury nullification was argued in the recent case of two AIDS activists charged with posession of hypodermic syringes while trying to run illegal needle exchange programs in Nashua and Manchester.

Before their trial ended in a hung jury, the activists asked Judge Linda Dalianis to allow them to use the "competing harms" defense. Jurors would have been instructed specifically that if they found that the men were doing more good than harm, they could acquit.

Dalianis rejected their arguments, leaving the men no choice but to ask jurors to exercise their right to nullify the law.

The activists argued the law barring posession of syringes was unreasonable, and urged jurors to acquit them despite clear evidence that they had broken the law.

At the end of the trial, Dalianis described the case to jurors as "one in a million."

The jury was unable to reach a unanimous verdict, and a mistrial was declared. Prosecutors have decided to retry the two men; the case has been scheduled for May 13.

Although jury nullification is rarely argued today, it became so common in Colonial America that the British took away the right to trial by jury — a decision that only helped diminish the popularity of British rule.

The practice has been used for better and worse. Before the Emancipation Proclamation, juries in northern states often refused to convict escaped slaves under the Fugitive Slave Law. After the Civil War, southern juries tended to acquit whites accused of violence against blacks.

Jury nullification is occassionally invoked at trials involving various — usually controversial — political causes.

New Hampshire courts have long recognized nullification as a jury's prerogative and New Hampshire jurors are given more leeway than in courts in many other states.

"We have recognized jury nullification as the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence," the state Supreme Court wrote in State vs. Bonacorsi, 1994, echoing earlier federal court rulings.

The state's courts generally are "far more defense oriented, or liberal, than one finds in other states," Hillsborough County Attorney Peter McDonough said.

"I'm not necessarily suggesting that's bad; it's just a fact," McDonough said.

How much a jury hears about the nullification option is largely up to the judge presiding over a trial. In recen
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not guilty."
If, on the oth
prosecutors hav
"you should
guilty."
The key wor

Practice is rare but very real

By ANDREW WOLFE
Telegraph Staff

Hillsborough County Attorney Peter McDonough recalls a

with passing bad checks. Conviction seemed like an iron-clad, lead-pipe cinch.

"The evidence went substantially for the state. The defendent took the stand, and essentially admitted all the elements of the crime, much to my appreciation," McDonough said.

The jury found the guy not guilty.

grocery store, and I asked her what happened," McDonough said. "She said, 'Oh we knew he was guilty, but he seemed like a nice young man and we thought we'd give him a break.' "

See RARE, Page 15

Rare

■ From Page 1

"These things happen," he said.

tant ingredient in deciding a case," he said.

Criminal defense lawyers agreed.

"You can't take the human being out of the juror," Concord defense lawyer Mark Sisti said.

argued in the recent trial of two AIDS activists arrested for trying to run illegal needle exchange programs. It's been argued by anti-nuclear protesters arrested for trespassing, but it's not just a left-wing tool. Anti-abortion protesters

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SPARF AND *DOUGHERTY* REVISITED: WHY THE COURT SHOULD INSTRUCT THE JURY OF ITS NULLIFICATION RIGHT

David C. Brody*

INTRODUCTION

During the past few years, the results of high-profile criminal trials have led to increasing public debate concerning the criminal trial jury. In this period, juries acquitted O.J. Simpson,[1] Marion Barry,[2] Oliver North,[3] Lorena Bobbitt,[4] the Menendez brothers,[5] and the Los Angeles police officers accused of beating Rodney King,[6] of the primary charges brought against them, despite what is commonly perceived as overwhelming evidence of guilt. Such verdicts were vociferously denounced in the media and spawned widespread criticism that juries are running amok and refusing to follow the law.[7]

Ironically, during this same period, a number of legislatures nationwide debated whether the jury in a criminal trial should be instructed that it has the right to return a verdict of not guilty despite overwhelming evidence of guilt. In the first half of 1995, at least ten legislatures introduced bills or

* Presidential Fellow, University at Albany, School of Criminal Justice; J.D., 1990, University of Arizona College of Law; B.A., 1987, University of Arizona.

1. Neil Henderson & Marc Fisher, *O.J. Simpson Acquitted: Football Legend "Relieved" at Verdicts After 9-Month Double Murder Trial*, WASH. POST, Oct. 3, 1995, at A1.

2. Anne Bowen Poulin, *The Jury: The Criminal Justice System's Different Voice*, 62 U. CIN. L. REV. 1377 (1994).

3. United States v. North, 920 F.2d 940 (D.C. Cir. 1990); David Johnston, *North Guilty on 3 of 12 Counts*, N.Y. TIMES, May 5, 1989, at A1.

4. Bill Miller & Marylou Tousignant, *Bobbitt Acquitted in Attack on Husband*, WASH. POST, Jan. 22, 1994, at A1.

5. Seth Mydans, *The Other Menendez Trial, Too, Ends With The Jury Deadlocked*, N.Y. TIMES, Jan. 29, 1994, at A1.

6. Richard A. Serrano, [illegible]

7. *See* Peter S. Canellos, *On Panel Of Peers, The Jury Is Out*, BOSTON GLOBE, Jan. 29, 1995, at 1, 5 (alleging increasing public skepticism of jury system due to nullification verdicts); Tony Mauro, *Abuse As An Excuse Wears Public Out*, USA TODAY, Feb. 1, 1994, at A1 (criticizing [illegible] of responsibility through [illegible] such as temporary insanity, battered-spouse syndrome, and mob mentality); Mydans, *supra* note 5 (identifying legal, ethical, and moral dilemma of defendants seeking acquittal notwithstanding admission of guilt); Richard Morin, *Polls Uncover Much Common Ground on L.A. Verdicts*, WASH. POST, May 11, 1992, at A15 (illustrating [illegible] belief of blacks and whites that defendants in [illegible] cases should have been found guilty); Lewis Grizzard, *No Joking. I Just Can't Laugh About Bobbitt*, ATLANTA J. & CONST., Jan. 26, 1994, at B1 (admonishing criminal justice system for finding Lorena Bobbitt not guilty despite undisputed fact that she cut off her husband's penis).

proposed amendments to state constitutions th
inform juries of their absolute right to extenc
defendants in criminal trials.[8]

As a general rule in the United States, every p
manner monitored or checked by another institu
ment, the President is restrained by his inability t
bills passed by Congress,[9] Congress's capacity
Supreme Court's judicial review of his actior
impeachment.[12] Congress is similarly limited by F
review,[14] and voter removal.[15] The judiciary is
ability to make appointments,[16] Congress's po
Constitution's amendability.

The jury is unique in that it is the only pol
citizens directly exercise governmental power an
trial—the only political institution whose powe
institution. In a criminal trial, the jury has the
authority to acquit the defendant regardless of t
Exercise of this authority is unreviewable due to
tion against "double jeopardy"—the retrying of
the same offense.[20] Additionally, a court may nc
the prosecution may not appeal.

In our society, which relies on institutional c
abuses of governmental power, we accept the
acquit as a necessary part of its role to mediate t
law in certain cases, but we remain wary of the

8. S. 311, 143rd Ga. Gen. Assembly, Regular Sess. (1995); S.
Regular Sess. (1995); H.R. 296, 54th Mont. Leg. Sess., 1st Regula
Leg., 1st Regular Sess. (1995); H.R. 2514, 74th Tex. Regular Sess

10. U.S. CONST. art. I, § 7.

11. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

12. U.S. CONST. art. II, § 4.

13. U.S. CONST. art. I, § 7.

14. *Marbury*, 5 U.S. at 166.

15. U.S. CONST. art. I, §§ 2-3.

16. U.S. CONST. art. II, § 2.

17. U.S. CONST. art. I, § 3.

18. JAMES P. LEVINE, JURIES AND POLITICS (1992). Levine
[involve politics] when people use personal discretion to produc
issues." *Id.* at 14. Levine goes on to say a "jury is a political insti

19. *See* Horning v. District of Columbia, 254 U.S. 135, 138 (19
power to bring in a verdict in the teeth of both law and facts.").

20. The Double Jeopardy Clause reads in part, "nor shall
offense to be twice put in jeopardy of life or limb . . . ." U.S. CO

Local man arrested on jury influencing

State of Connecticut

By His Excellency JOHN G. ROWLAND, Governor: an

Official Statement

WHEREAS, September 5, 1996 will mark the 326th anniversary of the day when the jury, in the trial of William Penn, refused to convict him of violating England's Conventicle Acts, despite clear evidence that he acted illegally by preaching a Quaker sermon to his congregation; and

WHEREAS, by refusing to apply what they determined was an unjust law, the Penn jury not only served justice, but provided a basis for the U.S. Constitution's First Amendment rights of freedom of speech, religion, and peaceable assembly; and

WHEREAS, September 5th also commemorates the day when four of Penn's jurors began nine weeks of incarceration for finding him not guilty. Their later release and exoneration established forever the English and American legal doctrine that it is the right and responsibility of the trial jury to decide on matters of law and fact; and

WHEREAS, the Sixth and Seventh Amendments are included in the Bill of Rights to preserve the right to trial by jury, which in turn conveys upon the jury the responsibility to defend, with its verdict, all other individual rights enumerated or implied by the U.S. Constitution, including its Amendments. The State of Connecticut recognizes these as true and unalienable; now

THEREFORE, I, John G. Rowland, Governor of the State of Connecticut, do hereby officially designate September 5, 1996 as JURY RIGHTS DAY in the State of Connecticut.

John G. Rowland

Governor

San Francisco and Los Angeles
Daily Journal April 2, 1996 [Calif. legal community paper]

'Jury Nullification' Takes Political Path

"'My goal is the subversion of American criminal justice, at least as it now exists. Through jury nullification, I want to dismantle the master's house with the master's tools.'"

— Former federal prosecutor Paul Butler in the December 1995 Yale Law Journal.

SACRAMENTO — To critics of "jury nullification," telling jurors they have the power to reject the law runs the risk of unleashing anarchy in the courtroom.

But invoking the controversial doctrine is precisely what one El Cajon Republican wants to do. Introduced in the Legislature in late February by Assemblyman Steve Baldwin is AB3079, a bill to amend the Code of Civil Procedure to include a jury nullification clause in juror instructions for misdemeanor cases.

The bill seeks to ensure that jurors know about their asserted authority to ignore the judge and letter of the law so they can vote with their conscience, if necessary. Sponsored by a group called the Fully Informed Jury Association, the legislation, Baldwin says, is an attempt to make sure that jurors know they hold the power to keep government in check.

The association, based in Utah, is a jurors' rights activist group that has taken a lead role in the nullification movement. Its aim, the group says, is to make sure juries know "the whole truth" about their rights.

"Juries are a stopgap against government encroachment," Baldwin noted. "All my bill does is allow them to be instructed that they can take a moral stance in their decisions." A similar bill, by state Sen. Don Rogers, R-Tehachapi, recently was dropped in favor of AB3079.

Why this? Why now? Nullification, this year's model, isn't another O.J. Simpson case-spawn, Baldwin says, even though defense attorney Johnnie Cochran tacitly suggested it when he urged jurors to "send a message" to the Los Angeles Police Department by judging the quality of the investigation and the police officers as much as the quality of the facts.

"Johnnie Cochran's closing argument didn't come out of nowhere," said Professor Howard Gillman, a constitutional law expert with USC.

To find the seeds for today's nullification drive, law experts say, look to botched federal raids in Ruby Ridge, Idaho and Waco, Texas; search the sometimes draconian penalties of three strikes; and sift through repeated calls, most recently in an article in the Yale Law Journal, for minority jurors to consider the way the judicial system has treated their group when they consider the fate of a similar-race defendant.

In the article, published in December 1995, author and former U.S. attorney Paul Butler,

Continued on Page 6

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about incom

Nullification Faces Another Test of Political Stre

Continued From Page 1

now a professor at George Washington University law school, argues that in some cases, for certain nonviolent offenders, the biased legal system established by predominantly white lawmakers and enforcers gives black juries the "moral responsibility ... to emancipate some guilty black outlaws."

"It is a reaction to authority," USC'sGillman said. "It forms one of the bulwarks against government overreaching."

According to legal experts, jury nullification simply means that once a judge turns a case over to a jury, the power of the law is theirs, even if that power means they can disregard the law, evidence and instructions, and acquit a defendant based on their personal beliefs or [illegible] ity.

Legally, courts that have reviewed the doctrine say this: Jurors don't have the express authority to ignore the law, but there isn't any process to prevent them from doing so if they choose.

In what is considered the seminal, if somewhat murky decision, *Sparf and Hansen v. United States*, 156 U.S. 60 (1895), the Supreme Court said that jury members did not have the express right to disregard the law. However, the decision left disputed legal precedent by stopping short of criticizing the lower court's jury instructions that included a mention of their power to nullify. Since then, both sides on the issue have used *Sparf* to try to prove their point. And the real question for the Legislature remains: Should jurors be told about nullification?

Prosecutors think not.

"From our focus, jurors have a fundamental responsibility to follow the law," said Gregory Totten, executive director of the California District Attorneys Association. "These bills allow jurors to find an excuse to use a bias and possibly ignore the law."

Totten likened it to a juror who believes it is fine to hit a spouse, ignoring the law when deciding in a spousal-battery case.

"This is bad public policy," he said. "If we encourage people to throw out the laws that they don't like, the [illegible]

This isn't nullification's first trip down the political path. It predates the U.S. government and [illegible] of William Penn and William Mead in 1670. Both had been arrested when they defied the King Charles II and worshipped as Quakers, not as an Anglicans as the king required of all subjects.

At the trial, the jury, knowing the defendants didn't dispute the facts, returned a not-guilty verdict because they considered the law unjust. Shortly after, the government dropped a brief, post-verdict [illegible] of the jurors, who were led by Edward Bushell. This laid the foundation for the separation of juror power from the court's.

Since then, nullification has resurfaced, repackaged for nearly every generation when groups believe the government's power extends too far. Movements to add or codify nullification to jury instructions became popular in the 19th century when some juries refused to convict under the Fugitive Slave Act. The McCarthy communism hunts in the 1950s spawned a drive for codified nullification, as did the legal campaigns against social protesters in the 1960s, who faced substantial prison time for their activities against the Vietnam War. Case history is extensive.

"Not only has it been around a long time, but it is part of the historical impor- [illegible]

[illegible] in Sacramento. "It tends to be associated with whatever group is in the minority."

This time, however, nullification lacks the single, dramatic social issue that has driven it in the past. It gains its support from new sources: the odd marriage of the far right and far left (who recently have found themselves also allied against asset seizure laws); the steady drumbeat for change by FIJA, which has been ticketed for distributing informational fliers to prospective jurors, and has its own electronic bulletin board on the World Wide Web; and minority groups who are being tapped under the premise that the system historically has cut t
Butler alleges.

In 1990, Oregon's
to embrace an initi
judges to inform juri
al right" to nullify
instructions, "[if] you
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not required to do so.'
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Baldwin realizes h
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The consensus
scholars is to leave it

TEXAS FORUM
ON CIVIL LIBERTIES & CIVIL RIGHTS

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Articles

Jury Nullification as a Defense Strategy

Clay S. Conrad*

I. Introduction

This essay examines the doctrine of "jury nullification," or "jury independence," in criminal trials.[1] The doctrine holds that jurors in criminal cases have the right to judge not only the facts, but the law as well.[2] If they believe the law in a specific case to be unjust, it is their prerogative to acquit. If they believe a law is misapplied, or that the judge is misinterpreting the law, they may follow their own judgment.[3]

The basis of the doctrine is the uncontroverted power of juries in criminal cases to render a general verdict of "guilty" or "not guilty."[4] The prosecution cannot reindict a defendant who has been acquitted due to jury independence.[5] The court cannot, regardless of the strength of the evidence,

...

* Staff Member, Texas Criminal Defense Lawyers Association. B.S. 1993, Franklin Pierce College; J.D. 1995, The University of Texas School of Law.

1. This essay will not examine the law-judging role of civil juries. Jury law-judging is especially problematic in civil cases due to the increased powers of civil court judges to direct verdicts and grant new trials. There is no protection against double jeopardy in civil trials.

The law-judging function of juries is commonly titled "jury nullification" or "jury veto power," however, "jury independence" is a more accurate description. Guinther found that "Despite its routine usage in law-journal prose, the phrase [jury nullification] is both inaccurate and improperly pejorative." JOHN GUINTHER, THE JURY IN AMERICA 220 (1988).

2. Professors Alan W. Scheflin and Jon M. Van Dyke have produced a large body of work arguing in support of the doctrine of jury nullification. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS [1977] [hereinafter VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT]; Alan W. Scheflin, *Jury Nullification: The Right To Say No*, 45 S. CAL. L. REV. 168 (1972); Alan W. Scheflin and Jon M. Van Dyke, *Jury Nullification: Contours of the Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51; Alan W. Scheflin and Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165 (1991); Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224 (1970).

3. *See* Schnier v. People, 23 Ill. 17, 26 (1859):

> If they can say upon their oaths that they know the law better than the court does, they have the right to do so; but before assuming so solemn a responsibility, they should be sure that they are not acting from caprice or prejudice . . . but from a deep and confident conviction that the court is wrong and that they are right. Before saying this upon their oaths, it is their duty to reflect, whether from their habits of thought, their study and experience, they are better qualified to judge of the law than the court.

4. The right of a defendant in criminal proceedings to have the jury render a general verdict was reiterated in United States v. Spock, 416 F.2d 165, 180-83 (1st Cir. 1969) (setting aside verdicts and vacating judgments because use of special interrogatories placed undue restrictions on the jury's right to deliver a verdict free from judicial control).

5. U.S. CONST. amend. V. The constitutional guarantee that "No person shall . . . be subject for

TEXAS

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On January 20-21, Texas
Austin law offices of longtim
IV, and formed a Texas corp
Fully Informed Jury Associatio
of Brenda Anderson of Lewis
Larry Dodge of Dallas, and
Glass was selected as President,
and Tom Zavist of Houston

Additional attenders of the January leadership meeting were **Richard Lee** and **Amy Doktor** of Houston, **Larry Barthel** of Euless, **Jay Manifold** of Dallas, and **Dr. Jim Shaw** of Austin.

Also since the meeting, **Mike Lenker** has taken over maintenance of the LS-FIJA database, and **Trey Summitt** is providing free graphics design work and will coordinate printing. Richard Lee and Amy Doktor are doing the arduous task of "stuffing and mailing", which so far has meant getting out a two fund-raising letters written by Larry Dodge, and mailing candidate questionnaires.

Mark Bielamowicz took the questionnaire strategy a little further than that just before Super Tuesday, by calling up the campaign HQ's of all the Republican candidates for Texas Court of Criminal Appeals (equivalent to the Supreme Court in most states), asking the candidates to

Lone Star FIJA reorganization, January 20 in Austin, Paul Velte's office. L - R: Clay Conrad, Richard Lee, Amy Doktor, Tom Glass, Brenda Anderson, Larry Dodge, Jay Manifold, Larry Barthel and Tom Zavist.

Washingtor
May 19

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